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REPORTS OF CASES

DETERMINED IN

THE DISTRICT COURTS OF APPEAL

OF THE

STATE OF CALIFORNIA

C. P. POMEROY
REPORTER

H. L. GEAR
ASSISTANT REPORTER

VOLUME 23

SAN FRANCISCO
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1914

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DISTRICT COURTS OF APPEAL.

FIRST APPELLATE DISTRICT.

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FRANK H. KERRIGAN, Associate Justice.

JOHN E. RICHARDS, Associate Justice.

SECOND APPELLATE DISTRICT.

MATTHEW T. ALLEN, Presiding Justice.¹

N. P. CONREY, Presiding Justice.²

W. P. JAMES, Associate Justice.

VICTOR E. SHAW, Associate Justice.

THIRD APPELLATE DISTRICT.

N. P. CHIPMAN, Presiding Justice.

ELIJAH C. HART, Associate Justice.

ALBERT G. BURNETT, Associate Justice.

¹ Died, October 10, 1913.

² Appointed, October 18, 1913, in place of Hon. Matthew T. Allen, deceased.

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REPORTS OF CASES
DETERMINED IN
THE DISTRICT COURTS OF APPEAL
OF THE
STATE OF CALIFORNIA.

[Civ. No. 1111. Third Appellate District.—October 1, 1913.]

HENRI GOBERT, Appellant, v. F. L. BUTTERFIELD
et al., Respondents.

MINES AND MINERALS—LOCATOR OR DISCOVERER—RIGHT TO PROTECTION FROM INTRUSION.—A locator of a mining claim cannot be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer.

ID.—AMENDMENT OF NOTICE OF LOCATION—DOCTRINE OF RELATION.—Where the object of amending the notice of a location of a mining claim is to cure obvious defects, and there is no attempt to include new ground, the amended certificate will relate back to the original, notwithstanding intervening locations.

ID.—EXCESSIVE LOCATION—HOW FAR VOIDABLE.—A location of a mining claim in excess of the statutory limit, where it injures no one when made, if made in good faith, is voidable only as to the excess.

ID.—AMENDMENT OF LOCATION—RIGHT TO MAKE.—A locator of a mining claim may amend his location, if it can be done without prejudice to the rights of others.

ID.—MARKING OF BOUNDARIES—EFFECT OF SUBSEQUENT OBLITERATION.—Where a mining claim is once sufficiently marked on the ground, and all necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without his fault. If the evidence shows that the boundaries were originally marked, the fact that the stakes then set cannot in later years be found, raises no presumption against the validity of the original marking.

ID.—TIME FOR MARKING CLAIM.—A claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within which such marking was made is reasonable or not.

ID.—ACTION TO DETERMINE TITLE—CONFLICTING BOUNDARIES.—In this action to determine title to a quartz mining claim the evidence was sufficient to justify the trial court in concluding that the plaintiff had no intention originally of claiming any ground beyond the disputed boundary line, and that his object in amending his location was to take advantage of a discovery made by one who had already in good faith located the ground.

APPEAL from a judgment of the Superior Court of Plumas County. J. O. Moncur, Judge.

The facts are stated in the opinion of the court.

L. N. Peter, for Appellant.

H. B. Wolfe, for Respondents.

CHIPMAN, P. J.—Plaintiff brings the action to determine his title to a certain quartz mining claim situated in Plumas County, and alleging, among other things, that defendants had wrongfully entered upon said claim and were removing ore therefrom, and praying for an injunction to prevent the said trespass. Defendants denied plaintiff's ownership and claimed ownership in defendant Butterfield. The controversy relates to a triangular parcel of land situated at the easterly end of the so-called Old Harry Quartz claim, herein referred to as the Old Harry, claimed by plaintiff, and the westerly end of the so called Old Harry Extension quartz claim, herein-after referred to as the Old Harry Extension, claimed by defendant Butterfield and under lease to defendants Shinn and Smith. The ownership of the respective claims as alleged in the pleading is not disputed except as to the small piece of land in controversy, and the question here concerns only the location of the boundary line between the two claims. This triangular piece of land is 248.7 feet wide at the northerly boundary line of the two claims, and tapers close to a common point marking the southeasterly corner of plaintiff's claim and the southwesterly corner of defendants' claim.

The court found that defendant Butterfield is the owner of the disputed land and defendants Shinn and Smith lessees

thereof with an option to purchase. The restraining order was accordingly discharged and judgment passed for defendants. Plaintiff appeals from the judgment and brings here the judgment-roll and a duly certified transcript of the proceedings at the trial.

A motion was made by plaintiff to have the cause submitted on briefs on file, under rules II and V, [160 Cal. xlii, xlv, 119 Pac. ix, x], because of respondents' failure to file their reply brief in time. Respondents made no appearance at the hearing of the motion and have filed no brief. The cause was submitted for decision in accordance with said motion.

It appeared that, on December 11, 1899, plaintiff posted on his claim a preliminary notice and, on July 11, 1900, his final notice of location. These notices stated that the land was in Plumas township, Plumas County, on surveyed land of the United States, "and particularly described as follows: Beginning 700 ft. east of notice posted at point of discovery and running westerly 1500 ft. together with 300 ft. of surface ground on each side of the lode or vein. The exterior boundaries are definitely marked so as to be readily traced." On July 31, 1912, plaintiff posted an "amended notice of quartz location" in which his former location was extended easterly to definitely include the disputed piece of land and he declared in his notice that it was "for the purpose of amending" the said preliminary and final notices of 1899 and 1900.

On August 10, 1912, he posted another amended notice of location in which he declared his purpose to be to amend his preliminary and final notices of said claims made in 1899 and 1900, and also to amend his amended location posted on July 31, 1912. Plaintiff's amended complaint describes his claim so as definitely to include the disputed land.

Defendants introduced evidence of the location of the Old Harry Extension posted on the claim January 1, 1912, by Robert McAuley; also a quitclaim deed by McAuley of said mining claim to F. L. Butterfield, dated July 16, 1912; also a notice of location by Butterfield which declared that it "was for the purpose of amending and perfecting the description of the Old Harry Extension quartz claim, the notice of the location of which is recorded in vol. 10 of Quartz Claims, Plumas Co. records," the notice of location posted and recorded

by McAuley. This amended location was posted on the claim August 2, 1912.

Plaintiff's amended location and the McAuley location and Butterfield's location embraced the disputed land.

Appellant states certain propositions which may not be controverted: That a locator cannot be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer (*Ehrhardt v. Boaro*, 113 U. S. 527, [28 L. Ed. 1113, 5 Sup. Ct. Rep. 560]); that where the object is to cure obvious defects, and there is no attempt to include new ground, the amended certificate will relate back to the original, notwithstanding intervening locations (*Lindley on Mines*, p. 719); that a location in excess of the statutory limit, where it injures no one when made, if made in good faith, is voidable only as to the excess (*Lindley on Mines*, p. 664); that a locator may amend his location, if it can be done without prejudice to the rights of others (*Id.* 984); that where the claim is once sufficiently marked on the ground, and all necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without the fault of the locator. If the evidence shows that the boundaries were originally marked, the fact that the stakes then set could not in later years be found raises no presumption against the validity of the original marking (*Id.* 691, 692); that a claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within which such marking was made is reasonable or not (*Id.* pp. 597, 679).

The case turns largely on the fact whether the plaintiff originally placed a stake at the point now claimed as his northeast corner, being the point at which he placed a stake when he surveyed and posted his amended location, in 1912, and whether he claimed originally his easterly end boundary to be on a line leading from said northeast corner to the point originally and now claimed to be his southeast corner, which is substantially Butterfield's southwest corner. Plaintiff was the only witness to his having placed a stake for his northeast corner at the point above referred to. He testified that it was the same as the stake at the other corners; that it was pulled

up and thrown away about two or three months later and he never replaced it for the reason, as he testified: "I got a witness tree marked; I think the witness tree show my post was there." He testified that he marked the lines by blazing the trees between the corners, and that these blazed trees plainly marked his line and were as near to it as he could find them. He testified that, without compass or chain, he stepped off the distances from corner to corner, commencing at the southwest corner of his claim and endeavored to mark out a piece of ground whose sides were of equal length and the ends parallel, as near as he could. When his survey was made, it appeared that his north boundary line, as he then claimed it, was about one hundred and sixty feet longer than his south boundary line, while the two end lines were within a few feet of the same length. His explanation of the difference between the north and south lines was shown not to be satisfactory. Witness Barbee, who surveyed plaintiff's claim, commencing August 22, 1912, testified that he located the corners and lines under plaintiff's direction, he himself having no knowledge of them except as imparted by plaintiff; that he found no corner at the point claimed as plaintiff's northeast corner, but found the other corners. He was asked, on cross-examination: "Q. Was there any evidence of a stake or mound of rock at or near this place you established as the northeast corner? A. No, sir." Of the blazed tree he found eight or nine feet from where he placed the corner; he testified that it was blazed on the east and west sides and not on the north; that it was not blazed as he would have blazed it to mark a corner; that he would not have taken it for a corner tree, but as a line tree, and that plaintiff "did not claim that was a corner." He testified that he found blazed trees along the boundary lines which plaintiff pointed out as having been marked by him as boundary trees. Witness Barbee also testified that he noted but one blazed tree between the original northeast corner and the northeast corner established in this survey of April, 1912, a distance of 278.5 feet as shown by defendants' plat, exhibit "B." There was evidence that there were a good many trees along that line which might well have been marked as line trees if a line had been run there. Witness Barbee also testified that he saw no evidence of any work or mining done on plaintiff's claim east of the line now

claimed as Butterfield's west boundary line except the work in the shaft being done by defendants at the time Barbee made his survey. He found and located on his plat the tunnels, drifts, and shafts, and other workings done by plaintiff since he located the claim in 1900. Barbee also testified that he found no center end stakes of plaintiff's claim, and no center or lode line blazed.

Surveyor Watson was a witness for defendants and made a plat (defendants' exhibit "D") showing in red lines the survey made by Barbee and in black lines the survey of the Butterfield claim by Surveyor Cameron made in June, 1912, as located by McAuley in January, 1912. He found no evidence of any workings east of the west line of the Old Harry Extension (the Butterfield or McAuley claim) except the shaft called the Butterfield shaft, the work of defendants. He testified that the distance between Butterfield's west end center and plaintiff's new east end center was one hundred and twenty feet.

On October 1, 1910, plaintiff leased to Charles Grill and Robert McAuley a certain parcel of the Old Harry claim for the period of eighteen months from the date of the lease, "to mine and stope and extract all ores, together with all ground extending from the east end line of the said 'Old Harry' claim along the course of said vein six hundred (600) feet." Witness Grill testified that they worked under the lease about 17 months, to about April 1, 1912; that other lessors were there in June, 1911, and it became necessary to mark out the land included in his lease; that plaintiff and Grill and McAuley did this at that time. He testified that they "started at a tree Mr. Gobert said was his east end line or very near his east end line, and measured 600 feet to a cedar tree and marked the cedar tree." He testified that he had, recently, in company with Mr. Butterfield, found the tree indicated at the east end line and also the cedar tree. He was asked what he used to measure the ground at first, and answered: "A 75 foot tape; Mr. McAuley carried the front end of the tape, Gobert and I brought up the rear. I stayed with Gobert." There was a certain ravine at the west end that he testified Gobert did not want them to go beyond. He testified that in his recent measurement "he used a 100 foot tape," and that they had no difficulty in finding the tree shown him as marking plaintiff's

east end line—the line now claimed by defendants as the west end of the Old Harry Extension. Witness Butterfield gave similar testimony as to this six hundred feet measurement. He was present in June, 1912, when Cameron surveyed the Old Harry Extension. He testified that plaintiff was there at the same time; that, in a conversation with plaintiff, witness told him that “the boundary lines between the two claims was being surveyed out”; that he heard surveyor Cameron tell him the same thing; that while Gobert was there the west end center of the Old Harry Extension was established and posts completed; that he was familiar with the ground since 1899 and never saw a stake or evidence of any corner at the point now claimed by plaintiff to be his northeast corner. He testified that he assisted Cameron in his survey of the Old Harry Extension and establishing the west end line; that they started at the cedar tree mentioned by Grill and ran six hundred feet to the yellow pine tree also mentioned by him and took that as the starting point or as marking the west end line of the Old Harry Extension. At this time shaft No. 1, marked on Barbee’s plat, had been dug about thirty feet and ore had been discovered. Defendants Shinn and Grill were working there at that time under a lease and “continued until stopped by order of this court”; that they were working there when plaintiff had his survey made by Barbee; that all the corners and the west and east end centers were established and post-marked by the Cameron survey in June, 1912. He also testified that he assisted Grill in posting the McAuley notice.

Witness Shinn testified to his having assisted in putting down what is called shaft No. 1, and that it is thirty or thirty-three feet east of the west end of the Old Harry Extension; that he worked there from the 25th day of June, 1912, until in August when stopped by injunction; that except their work there were no workings or discovery of ore east of that line. He testified that he assisted Cameron in making his survey on June 27, 1912; that plaintiff “came there while we were surveying. Q. What did he do while he was there? A. Stood there with his eyes wide open to see what he could see. Q. Did he follow along the line? A. Very close, yes, sir. Q. Do you know whether or not he was at the west end center of the Old Harry Extension? A. He was in sight of it.” He testified that plaintiff asked what they were doing

and Cameron told him they were "running a boundary line"; that the west end center of the Old Harry Extension claim "was either established or being established at the time he (plaintiff) was there"; that witness was then working on this claim and continued to do so until stopped by order of court. He testified that he had been at the point claimed by plaintiff as his northeast corner, both before and since the Barbee survey and he saw no evidence of an old corner, no evidence of a mound of rock, or stake, or corner. He testified that at the time the west end of the Old Harry Extension was being surveyed plaintiff "did not make any claim as to being the owner of this ground where work was being done"; that the first time he made any claim to it was on the twenty-second day of July, 1912. Defendant Smith was also present in June when the Cameron survey was made. He testified that plaintiff asked him what they were doing and he told him "they were running a boundary line"; that plaintiff "was there when the west end center was set up" of the Old Harry Extension; that plaintiff was living near the property. It appeared that after the location of the Old Harry Extension claim in January, 1912, the lines were not run out and marked until in June, 1912, at the time of the Cameron survey, but the evidence was that the survey embraced the land included in the location by McAuley. A copy of McAuley's location notice was introduced in evidence, marked exhibit "A" but, for some unexplained reason, is not in the transcript. There were some further facts and circumstances made to appear tending to confirm what, it seems to us, is sufficiently shown by the facts above given—that plaintiff's original location did not include and was not intended to include the land in dispute. For twelve years he had been working his claim and put down several shafts, had run two or three tunnels of some extent, on different parts of his claim, and one shaft was quite near to the disputed boundary, but in all this time he had not apparently made any claim further east nor had he prospected or done any work further east. As late as in 1910 he leased the east six hundred feet of the claim and in 1911 he designated the location of his east boundary line and this was the line claimed by McAuley as his west line. In June, 1912, when Cameron was surveying the McAuley location, plaintiff was present, saw and was told what was being

done. At that time a shaft had been dug on the McAuley claim and work was being done on it. He saw this but made no claim that it was on his location. It was not until the latter part of July that he asserted any right to this land and then it was he posted and filed his notice of amended location. He explained his silence by testifying that he thought the lines were being run and the work done by a company that held an option on his property then about to expire. It was shown that this company had applied for an extension of time on their option and was refused and that the company had ceased work some time before. The facts brought out were such as to have warranted the trial court in rejecting this explanation as accounting for plaintiff's silence when he learned that the disputed land was claimed by another.

The rules of law invoked by plaintiff were established to meet the conditions under which prospectors and mineral locators often find themselves in making their locations and are just and salutary and are in the interest of honest effort to develop the mineral resources of the country. Turning back to these rules, can it be said, in the face of the evidence which the learned trial judge presumably accepted as true, and so must we, that the defendants' acts were tortious and an intrusion upon plaintiff's rights as a prior discoverer? Can it be said that his amended location was to cure obvious defects in his original location; that his amended claim was without prejudice to the rights of others; that there were no intervening rights when he extended his claim so as to include the ground located by McAuley and on which McAuley's grantee was working when this extended claim was being marked out? The answers must be in the negative. It is true that McAuley was plaintiff's tenant at the time McAuley located his claim, but he and his partner, Grill, had been shown the eastern boundary of plaintiff's claim by plaintiff himself after more than ten years of possession and it was nearly a year thereafter that McAuley made his location. There is no evidence of bad faith on McAuley's part or that plaintiff was deceived or lulled into a feeling of security by him or any one else.

The evidence was conflicting but we think there was sufficient evidence to justify the trial court in concluding that plaintiff had no intention originally of claiming any ground

beyond the disputed boundary line and that his object in amending his location was to take advantage of a discovery made by one who had already in good faith located the ground. We do not doubt that had there been no intervening rights plaintiff could have lawfully done what he attempted to do. The rules relied upon by him, and as we had occasion to consider them in *Madera and Western Carbonic Acid Co. v. Sonoma Magnesite Co.*, 20 Cal. App. 719, [130 Pac. 175], so declare. But, unfortunately for him, he failed to do these acts which these rules presuppose have been done in order to protect him in his assumed rights.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1169. Third Appellate District.—October 3, 1913.]

ROSA KNAPP, Respondent, v. WILLIAM KNAPP, Appellant.

DIVORCE—CRUELTY—ACTS CONSTITUTING—SUFFICIENCY OF COMPLAINT.—

In an action for divorce on the ground of cruelty, the complaint states a cause of action if it alleges generally that the defendant wrongfully and willfully inflicted upon the plaintiff a course of grievous mental suffering and grievous bodily injury, and further specifically alleges, among other acts of violence, that the defendant, without reasonable cause or excuse, slapped the plaintiff's face and injured her person so as to leave black and blue spots thereon for several days.

ID.—DIVISION OF COMMUNITY PROPERTY—PRESUMPTION ON APPEAL.—

In such case the appellate court, in the absence of the evidence, will assume that the facts warranted the distribution of the community property made by the trial court between the parties.

ID.—DISPOSITION OF COMMON PROPERTY—DISCRETION OF TRIAL COURT.—

Where a divorce is granted on the ground of cruelty, section 146 of the Civil Code leaves the disposition of the community property, in the first instance, to the discretion of the trial court, with perhaps the qualification that, as a general rule, more than one-half of such property must be decreed to the innocent spouse.

ID.—SEPARATE PROPERTY—DISPOSITION IN DECREE.—The statute does not contemplate the disposition in the decree of the separate property, but of the community property only.

ID.—APPEAL—ERRORS OF WHICH DEFENDANT CANNOT COMPLAIN.—If the trial court failed to accord to the plaintiff what the findings of fact show she was entitled to in the way of property rights, it is of no legal concern to the defendant on appeal.

APPEAL from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

H. A. Luttrell, for Appellant.

George Samuels, and Samuels & Magnes, for Respondent.

BURNETT, J.—Plaintiff was granted an interlocutory degree of divorce on the ground of cruelty and she was awarded certain community property. The appeal is from that portion of the judgment "which attempts to and does set aside and award to the plaintiff herein the real property mentioned and described in said judgment; also that portion of said judgment which attempts to and does set aside and award to said plaintiff the household furniture mentioned and described in said judgment; also that portion of said judgment which sets aside and awards to plaintiff a one-third interest of, in and to the sum of \$1,000 mentioned and described in said judgment," and none of the evidence is brought up.

The points urged for reversal of the judgment are so destitute of merit as hardly to merit specific attention. However, they will be accorded brief consideration.

1. That the complaint states a cause of action for divorce on the ground of cruelty cannot admit of doubt. It is therein alleged: "That ever since the marriage of this plaintiff and said defendant and continuously during said period of time the defendant has wrongfully and willfully inflicted and he still does wrongfully and willfully inflict upon this plaintiff a course of grievous mental suffering and grievous bodily injury, and more particularly as follows, to wit." This is followed by the specification that, in January, 1906, "the said defendant at the residence of the parties hereto without any

reasonable cause, excuse or provocation willfully used force and violence on the person of this plaintiff"; that, in January, 1908, "the said defendant at the residence of the parties hereto without any reasonable cause, excuse or provocation therefor used force and violence on the person of this plaintiff, slapped this plaintiff in the face and injured the plaintiff's person and body, thereby causing this plaintiff to have black and blue marks upon her person and black and blue eyes for several days thereafter; that upon said occasion the said defendant without any reasonable cause, excuse or provocation therefor, broke and smashed the furniture in the house of said parties." Other similar instances are pointed out and the complaint proceeds: "That the foregoing acts and conduct on the part of the said defendant consist of but a few of the acts of cruelty and brutality inflicted upon this plaintiff by said defendant since and during the married life of said parties, and that by reason of the acts and conduct hereinabove specifically set forth and described, this plaintiff has been caused to suffer, and she has suffered and does now suffer great and grievous bodily injuries and great and grievous mental anguish, and the said plaintiff further alleges that to longer live with said defendant would, as plaintiff is informed and believes, and therefore alleges, be dangerous to the health and physical being of herself."

If the treatment by defendant of plaintiff as therein delineated does not constitute acts of cruelty, we confess our inability to understand the meaning of the expression. It appears that these acts were wrongful and that they inflicted upon plaintiff "grievous bodily injury" and "grievous mental suffering." A case is thus presented that meets the requirement of the code. (Civ. Code. sec. 94; *Barnes v. Barnes*, 95 Cal. 171, [16 L. R. A. 660, 30 Pac. 298]; *Fleming v. Fleming*, 95 Cal. 430, [29 Am. St. Rep. 124, 30 Pac. 566]; *McDonald v. McDonald*, 155 Cal. 665, [25 L. R. A. (N. S.) 45, 102 Pac. 927].) The objection that it does not appear that the said acts were wrongfully committed is hypercritical. The words "wrongfully and willfully," found in the first paragraph of the above quotation, are intended to modify the specific acts of violence that follow the general allegation. But aside from that, it can hardly be contended that it is lawful for a man "without any reasonable cause or without

excuse or provocation" to slap his wife in the face so as to leave for several days thereafter black and blue marks and also to discolor her eyes and, in addition, "to break and smash the furniture in the house." The acts were sufficiently characterized to bring them under the condemnation of the law. Defendant may regret that a man is not permitted to whip his wife as in the olden days but he should know that the customs and laws of mankind have changed with the progress of time. Though it may seem strange to defendant, neither the law nor enlightened public sentiment looks with favor even upon such acts as he confesses in the following allegation of his answer: "Defendant admits that on the 24th day of May, 1911, he slapped plaintiff but not with force sufficient to cause plaintiff much suffering, nor did suffer more than little pain thereby."

2. As to the motion to strike out portions of the complaint, it may be said that it is unintelligible from the transcript. But surmising what was intended, it follows from our interpretation of the complaint that the court did not err in denying the motion. Besides, it is perfectly apparent that if the court erred, we cannot say that defendant suffered any prejudice thereby.

3. The findings follow substantially the material allegations of the complaint, including a declaration that the plaintiff was without fault and a specific statement that the allegations of defendant as to wrong conduct on the part of plaintiff are untrue; and an inspection of them is sufficient to show that they support the judgment.

4. In the absence of the evidence it is, of course, impossible for us to say that the court abused its discretion in awarding the community property. The homestead and household furniture and one thousand dollars on deposit in the Citizens' Bank of Fruitvale were found to be community property and two-thirds of the money were set aside to defendant and the residue of said property to plaintiff. We must assume that the facts warranted such distribution. It is sufficient in this connection to refer to *Eidenmuller v. Eidenmuller*, 37 Cal. 364; *Eslinger v. Eslinger*, 47 Cal. 62; *Brown v. Brown*, 60 Cal. 579, and *Gorman v. Gorman*, 134 Cal. 378, [66 Pac. 313].

In the *Gorman* case it is said: "Where the divorce is granted on the ground of adultery or extreme cruelty, section

146 of the Civil Code leaves the disposition of the community property, in the first instance to the discretion of the trial court, with perhaps the qualification, inferred from a reading of the entire section, that, as a general rule, more than one-half of such property must be decreed to the innocent spouse in such case."

5. In his closing brief, appellant complains that there was no adjudication of the fact that a certain lot, "No. 7 in Block D," is the separate property of plaintiff. There was no allusion to this lot in plaintiff's complaint but in the answer it was alleged to be community property. The trial court found as a fact that this lot was the separate property of plaintiff but the decree is silent as to the matter. It is sufficient to say that if any one could complain of the omission, it must be plaintiff and not defendant. If the court failed to accord to plaintiff what the findings of fact show she was entitled to it is manifestly of no legal concern to defendant on this appeal.

Besides, the statute does not contemplate the disposition in the decree of the separate property but of the community property only. (Civ. Code, sec. 146.)

There is no merit in the appeal and the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1106. Third Appellate District.—October 3, 1913.]

JAY HENRY, Appellant, v. W. H. CASWELL et al., as
Caswell & Company, Respondents.

DEPOSITION—ISSUANCE OF COMMISSION TO NOTARY AS PERSON AGREED UPON BY PARTIES.—Where the parties to an action in this state stipulate that the deposition of a person "be taken before E. C. Ferguson, a notary public in and for the city of Chicago," the court may construe the term "notary public" as words of description, and, under section 2024 of the Code of Civil Procedure, issue the commission to him as the person agreed upon by the parties rather than to him in his official capacity.

ID.—SEAL OF NOTARY—WHETHER NECESSARY.—Where a commission is thus issued to a notary as an unofficial person to take the deposition of a witness out of the state, pursuant to the stipulation of the

parties, it is not necessary for the notary, in order for the deposition to be admissible in evidence, to attach his seal to his certificate.

APPEAL from a judgment of nonsuit of the Superior Court of Sacramento County. C. N. Post, Judge.

The facts are stated in the opinion of the court.

Jay Henry, for Appellant.

Chas. M. Beckwith, for Respondents.

CHIPMAN, P. J.—This is an appeal, within sixty days, from a judgment of nonsuit, on statement of the case, in favor of defendants dismissing the action, “upon the grounds,” as recited in the judgment, “that the plaintiff had failed to prove a sufficient case, inasmuch as the evidence introduced was in the form of depositions and that said depositions were and are incompetent.”

The only objection made to the admissibility of the depositions was that a notary’s seal was not attached to the certificate of the commissioner. The depositions were taken under the following commission, appointing E. C. Ferguson, of Chicago, Illinois, to perform that office:

“COMMISSION TO TAKE DEPOSITIONS.

“Title of Court and Cause.

“The People of the State of California, to E. C. Ferguson, 1450 Otis Building, Chicago, Illinois:

“Know you, that, trusting in your fidelity and circumspection we have appointed you Special Commissioner, and do hereby authorize you to administer the necessary oaths, and to take the depositions of Charles S. Hayes and Thomas F. Hanks, residing at 1508–1512 Tribune Building, City of Chicago, County of Cook, State of Illinois, in answer to the interrogatories, direct and cross, annexed hereto, in the matter of the above entitled cause.

“All of which matter, together with this writ, you will return to this Court, according to law, in a sealed envelope, directed to the clerk of said Court, at the City of Sacramento,

County of Sacramento, State of California, and forward the same, by mail or express, or other usual channel of conveyance.

"Witness the Honorable C. N. Post, Judge of Department 3 of said Court, and the seal thereof, at the City of Sacramento, County of Sacramento, State of California, this 29th day of October, 1912.

"(Seal)

E. F. PFUND, Clerk.

"H. W. HALL, Deputy."

This commission was issued pursuant to an order of the judge of said court "that a commission issue out of and under the seal of this court, directed to E. C. Ferguson, 1450 Otis building, a person agreed upon by and between the parties, residing at the city of Chicago, Cook County, state of Illinois, to take the testimony of Charles S. Hayes and Thomas F. Hanks, residing at the same place, as witnesses on behalf of the plaintiff," etc. A stipulation was entered into by the parties that the depositions of the persons above named "be taken before E. C. Ferguson, 1450 Otis building, a notary public, in and for the city of Chicago, county of Cook, state of Illinois. . . . The annexed are interrogatories proposed by the plaintiff on which such depositions are to be taken."

The depositions were subsequently duly taken and returned under a full and formal certificate showing what was done by the special commissioner. The certificate is signed "Elbert C. Ferguson, Special Commissioner."

It is quite apparent that the construction given the stipulation by the judge who made the order and issued the commission was that it was not to issue to Ferguson in his official capacity but to him as the person agreed upon by the parties. The order reads: "Upon reading and filing the stipulation of the parties to the above-entitled action, and upon the files, papers and records in this action, on motion of Jay Henry, attorney for plaintiff, it is ordered," etc. The judge was justified in construing the terms "a notary public in and for the city of Chicago, county of Cook" as words of description.

That there was authority for such appointment is expressly provided by section 2024 of the Code of Civil Procedure, and it was so held in *Alcorn v. Gieseke*, 158 Cal. 396, [111 Pac. 98].

In the case of *Tomby v. Brunt Pottery Co.*, 229 Ill. 540, [82 N. E. 336], the commission was issued to George E. David-

son in Ohio, a notary public. The depositions were returned signed by him as commissioner. The court said: "He derived his authority from the commission, and it is immaterial that he was also described as a notary public. It is not necessary that a commissioner hold any office, and a commission may be directed to any competent disinterested person. The person to whom a commission to take depositions is issued need only be designated by the office which he holds, and in either case he obtains his authority from the commission. (*Brown v. Luehrs*, 79 Ill. 575.) The addition of the description to the name of the commissioner did not add to or detract from his authority and no certificate was necessary. (*Kendall v. Limberg*, 69 Ill. 355.) The certificate showed that the witnesses were sworn and examined under oath, and the objections were properly overruled."

In the present case, had the commission issued to Ferguson as notary and in his official capacity, he should have taken the deposition and certified it as notary. (Code Civ. Proc., sec. 2024.) But as the commission issued to him as an unofficial person, his seal as notary would have added nothing to the genuineness of his certificate or its authenticity. The objection to the depositions was without merit and they should have been admitted as evidence in the case. It was error to grant the nonsuit.

The judgment is reversed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1173. Third Appellate District.—October 3, 1913.]

HUGH DOUGHERTY et al., Appellants, v. UNION TRACTION COMPANY (a Corporation), Respondent.

STREET-RAILWAY—PASSENGER ATTEMPTING TO ALIGHT FROM MOVING CAR—CONTRIBUTORY NEGLIGENCE.—Where a passenger on a street-car attempts, without notifying the conductor, to alight while the car is in motion, acting upon the assumption that because the speed of the car has been slackened it will stop at the next crossing, the negligence of the passenger precludes her from recovering from the

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railway company for injuries received by falling to the ground at the time of an alleged sudden jerk or lurch of the car.

ID.—SLACKENING OF SPEED OF CAR—ASSUMPTION THAT IT WILL STOP.—

It is not for a passenger, desiring to alight from a street-car at a particular place, but not having notified the conductor of such desire, to assume, and to act upon such assumption, that merely because the speed at which the car has been traveling has been diminished for some reason, it is to be stopped at the next street crossing, especially where such crossing is not one where the cars are required to stop in any event but only on signal.

ID.—PASSENGER ARISING WHILE CAR IS IN MOTION—CONTRIBUTORY

NEGLIGENCE.—For a passenger to arise from his seat, preparatory to leaving the car, while it is still in motion, raises no presumption of negligence on his part, or, in other words, is not negligence *per se*; but when a passenger arises from his seat in a moving car for any purpose, he must exercise a reasonable or proper degree of care to protect himself from falling off the car, or, if he is inside, from falling against any object properly in the car, otherwise any injuries he may thus sustain will legally be imputed directly to his own negligence.

ID.—CONDUCTOR—DUTY TOWARD PASSENGERS WHILE COLLECTING FARES.

When a street-car conductor is collecting fares, he is not to be expected to perform the impossible act of watching or keeping his eyes on all the passengers in the car, and there is, therefore, some responsibility very justly cast upon the passengers themselves to look out for their own safety, and before attempting to leave a moving car, or when preparing to do so, to notify the conductor in some proper manner of their desire to alight.

ID.—REMARKS AND INSTRUCTIONS OF COURT—WHEN NOT PREJUDICIAL.—

If the case is one which the court should take from the jury, because the personal injuries for which the plaintiff is suing were due to her own and not to the defendant's negligence, errors in the matter of the court's instructions and remarks are not prejudicial to the plaintiff.

ID.—NEW TRIAL ON GROUND OF IMPROPER REMARKS OF COURT—REVIEW

ON APPEAL.—Where the affidavits of the plaintiffs on their motion for a new trial on the ground of improper remarks by the court in the presence of the jury, are contradicted by the affidavits of ten of the jurors that they heard no such remarks, and the affidavit of the judge that he did not make them within the hearing of the jury, the decision of the trial court on the issue is conclusive on the appellate court.

APPEAL from an order of the Superior Court of Santa Cruz County refusing a new trial. Lucas F. Smith, Judge.

The facts are stated in the opinion of the court.

John H. Leonard, for Appellants.

H. A. Van C. Torchiana, W. P. Netherton, and Stratton, Kaufman & Torchiana, for Respondent.

HART, J.—The plaintiffs sued the defendant, a corporation, which maintains and operates an electric railway in the city of Santa Cruz, for damages in the sum of fifteen thousand dollars for personal injuries inflicted upon the plaintiff, Catherine, through the alleged negligence of the defendant.

The cause was tried by jury, who returned a verdict for the defendant, and the plaintiffs prosecute this appeal from the order denying them a new trial.

The answer, among other things, sets up contributory negligence on the part of the plaintiff, Catherine, and avers that but for negligence on her part she would not have met with the accident and received the injuries sustained by her.

The points urged for a reversal of the order are that the evidence discloses negligence by the defendant and no negligence by said Catherine, that the court erred in its rulings respecting the evidence, that the trial judge prejudiced the rights of the plaintiffs by certain remarks alleged to have been made by him in the presence of the jury, and that error was committed in the matter of the giving and refusing to give certain instructions.

The accident in which Mrs. Dougherty received the injuries complained of occurred on the twelfth day of May, 1909. Her version of how the accident happened is as follows: "I remember the journey on the street-cars in this city on May 12th, 1909. I took the car at the corner of Morrissey and Soquel avenues, transferred to the Mission Street car, and gave my transfer; when we got to the Bedell, I turned to motion the conductor to stop; he had gone through the car—at that moment he started through the car so I could not attract his attention, out on the front platform. The car slowed up. I supposed it was going to stop and stood up and took one step and the car jerked and threw me on the ground. I could not attract the conductor's attention, as I was on the back of the car, on the west side as the car was going southwesterly on Mission Street. I was seated on the outside of the car, and the seats are lengthwise on the car. If there was a person

seated in front of the car, it would have been impossible for me to pass that person without going down on the steps of the car to get where the conductor was. When I arose from my seat, the car had almost stopped. It slackened slowly. It was going quite fast when we passed the Bedell. The Bedell is not quite a block this side of Otis Street, but I do not know the distance. I had a basket in one hand and took hold of the pole with the other, the up and down pole on the car. I took one step—this step took me down a step to the lower step. I do not remember whether there were two steps on the car or not. I was thrown on the ground and stunned.”

It appears that at about the point where Mrs. Dougherty was thrown to the ground the motorman slackened the speed of the car to allow two passengers—one Peakes, and one Bibbins—who were sitting on the outside at the front part of the car—to alight. Peakes testified that it had always been his practice, when returning to his home on the street-cars, to leave the car, upon reaching his residence, while it was still in motion, the motorman always reducing the speed of the car to enable him to alight. On the occasion of the accident he left the car under those circumstances.

The conductor, Lang, testified that the car made a stop at Walnut Avenue, where a passenger boarded the car. Otis Street, on which the accident happened, was the next street to be reached after leaving Walnut Avenue. The passenger just referred to stepped and stood on the front platform and, immediately after the car started, the conductor went forward for the purpose of collecting the fare from said passenger. Lang proceeded: “I just went outside the front door, took his fare and turned around to go back in the car; saw Mr. Peakes on the front end of the car. Of course, I expected Mr. Davis, the motorman, to slow down and let him off; then I looked around; there was nobody to board the car. I was just inside the door; he then called for a signal that all was clear with two taps on the gong. I looked back through the car and saw that everything was all right, which I could see from the position I was in; all was clear and I gave him the signal; two bells, the signal that all was right; then I walked back to the middle of the car and I saw Mrs. Dougherty, this lady, I did not know her at the time, stepping down on the steps. I hurried toward her and at the same time gave a bell to the

motorman to stop, but before I could get to her and warn her about her danger, she stepped off or apparently stepped off the car and fell to the ground. . . . I was at the rear end of the car, near where Mrs. Dougherty was seated, very close to her, and she never said anything to me at any time about desiring to alight at Otis Street. She did not give me a signal, and I did not have any knowledge of the fact that she desired to alight at Otis Street at all. After the car slowed down sufficiently for Mr. Peakes and Mr. Bibbins to alight, we just gradually increased our speed; there wasn't any jerking or sudden start that I noticed. I was standing up all the time, and certainly would have noticed it if there had been. After collecting the fare from the passenger who boarded at Walnut Avenue, I went right back, turned right around and went right back to the rear end. The doors of the car were left open, but in going back, I had to turn and pass through the inclosed part of the car. . . . I was in a position (when he gave the motorman the signal) where I could see any one in the inside or in the rear of the car, but did not notice Mrs. Dougherty in particular; there was no passenger standing at that time. . . . If there had been I could have seen them. . . . I did not notice her particularly from any other passenger; there were probably about 17 on the car at the time. There were also passengers inside of the body of the car."

The witness, McCormack, an employee of the defendant and connected with its operating department for a number of years, said that the cars which were operated by the company at the time of the accident were equipped with a rope drum brake. "Air brakes and rope brakes," he continued, "are the two brakes generally used on the cars, but the car upon which the accident happened was equipped with a rope brake. The rope is operated around a drum. It is so constructed that, in stopping a car, it must stop gradually, and in starting up it will start gradually. It is impossible to start a car with a jerk when equipped with a rope brake. It is so constructed as to wrap around the drum and the weight of the rope on the drum makes it impossible to release the brakes instantly. While the air brakes can be released instantly and, of course, the car can start with a jerk, it is quite different with a rope brake." McCormack further testified that on certain parts of

the defendant's lines of railway there are certain places where the cars are required to stop whether or not there are passengers to leave or take the car thereat. At all other points, passengers desiring to leave or board the cars must signal the conductor or motorman. It is further made to appear that the point at which Mrs. Dougherty desired to leave the car and where she fell to the ground was not one of the regular stopping places.

A Mrs. Linstedt was sitting between Mrs. Dougherty and the main body of the car, and her testimony shows that it was not possible for the latter to have passed in front of Mrs. Linstedt without getting down on the steps. Mrs. Linstedt did not arise from her seat to let Mrs. Dougherty pass. She testified that she was not requested by Mrs. Dougherty to arise and that had such a request been made she would have certainly done so.

The question whether the car made a sudden lurch or jerk after its speed had been slackened to let two passengers swing to the ground while it was still in motion and which sudden lurch, it is claimed, caused the precipitation of Mrs. Dougherty to the ground from the step to which she had descended and upon which she was standing, was entirely one for the jury's determination. And upon that question there is a distinct conflict in the evidence, and the verdict must, therefore, be construed as a finding by the jury that the car was caused to make no such sudden movement. But even if it were true that the car did make a sudden lurch at the time and that by reason thereof Mrs. Dougherty was thrown to the ground, still, according to her own testimony, she herself was wholly to blame for the accident. She did not notify or signal the conductor that she desired to alight, but upon her own volition arose and placed herself in a position which, even under ordinary circumstances, was one which would be attended by more or less peril. The peril of her situation was increased in some measure by the fact that she was carrying and holding in one hand a basket, whereby she was necessarily handicapped to some extent in moving from the car to the step and, after reaching the step, in securing herself against falling. She knew that the conductor was at the opposite end of the car at the time, and of course knew that he could not then have known that she desired to leave the car.

But Mrs. Dougherty said that, the speed of the car having been slackened, she supposed it was going to stop at the next crossing, where it was her desire and purpose to alight. What she supposed the car was going to do is no excuse for her carelessness. It is not for a passenger, desiring to alight from a street-car at a particular place, and who has not notified the conductor of such desire, to assume, and to act upon such assumption, that, merely because the speed at which the car has been traveling has been diminished for some reason, it is to be stopped at the next street crossing toward which it is traveling, especially where, as was true in this case, the next crossing was not one where the cars are required to stop in any event but only on a signal to the conductor or motor-man by any one desiring to leave or board the car at that point.

No fault can be found with the cases, cited by the plaintiffs, in which it is held that the fact that a passenger arises from his seat, preparatory to leaving the car, while it is still in motion, raises no presumption of negligence on his part, or in other words, is not negligence *per se*. (See *Capital Traction Co. v. Brown*, 25 App. D. C. 473, [10 Ann. Cas. 813, 12 L. R. A. (N. S.) 831]; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407, [43 Atl. 1060]; *Alton R. Gas & Elec. Co. v. Webb*, 219 Ill. 563, [76 N. E. 687].) There is obviously nothing in the mere act of a passenger arising from his seat in a street or any other kind of a car while it is in motion which of itself constitutes negligence, but it will not be doubted, and the cases referred to do not otherwise hold, that, when a passenger arises from his seat in a moving car for any purpose, he must exercise a reasonable or proper degree of care to protect himself from falling off the car, or, if he is inside, from falling against any object properly in the car, otherwise any injuries he may thus sustain will legally be imputed directly to his own negligence. In this case, as has been shown, the injured plaintiff did more than simply to arise from where she had been sitting—she, obstructed in the free use of both hands as a protection against possible accident by engaging one in the carrying of a basket, descended to that part of the platform where the conductor usually stands, and thus remained until thrown to the street.

As to the claim that the defendant was negligent in that its conductor left the rear end of the car to go to the forward end for the purpose of collecting a fare from a passenger who had just boarded the car and taken a position on the forward platform, the reply is that the evidence clearly shows that that officer was then merely engaged in performing a duty which was required of him in the capacity in which he was acting for his employer. He was required as such employee to collect fares from the passengers, wherever they might be located on the car, and when he left the rear platform, where Mrs. Dougherty was then sitting, for that purpose, he was merely engaged in the doing of an act which Mrs. Dougherty well knew that his duties compelled him to do and which she, in common with all the other passengers and, indeed, with the whole traveling public, expected and anticipated that he would do. When performing that duty, a street car conductor is not to be supposed or expected to perform the impossible act of watching or keeping his eyes on all the passengers in the car, and there is, therefore, some responsibility very justly cast upon the passengers themselves to look out for their own safety, and before attempting to leave a moving car or when preparing to do so, to notify the conductor in some proper manner of their desire to alight. A passenger who fails to do this, does not exercise the care with which he is charged, viz.: that degree of care which an ordinarily careful and prudent person, having due regard for his safety, would exercise and be expected and required to exercise under similar circumstances.

Under the view we take of the evidence, as indicated by the foregoing, the defendant having been in no respect guilty of negligence and the damage sustained by Mrs. Dougherty directly the result of her own, the court below should have taken the case from the jury. It follows, therefore, that any errors committed by the court in the matter of the instructions or in its rulings or in the alleged prejudicial remarks of the judge in the presence of the jury are without prejudice. It may, however, be remarked that the court's charge, though it became, by reason of the fact that the evidence disclosed negligence in the injured plaintiff and none in the defendant, but little more than a mere abstract statement of the law covering the various elements entering into such a case,

is not obnoxious to any of the criticisms directed against it by the plaintiffs. The instructions submitted by the plaintiffs and disallowed by the court involved the exposition of no principle not correctly laid down in the court's charge.

It may further be remarked that the court made no error in its rulings upon the evidence which was prejudicial to the plaintiffs, and, as to the alleged remarks of the court in the presence and hearing of the jury, it is to be observed that the affidavits filed and pressed by the plaintiffs on their motion for a new trial setting forth the alleged remarks and the charge that they were made within the hearing of the jury were contradicted by affidavits of ten of the jurors, who deposed that they heard no such remarks as were thus imputed to the judge, and by the affidavit of the latter, who therein denied that the remarks referred to were made in the presence or within the hearing of the jury. It results that, if the point were important here, the decision of the trial judge upon the issue thus made would, under the conflict so disclosed, be conclusive upon this court.

The order from which this appeal is prosecuted is affirmed.

Chipman, P. J. and Burnett, J., concurred.

[Civ. No. 1182. Third Appellate District.—October 3, 1913.]

S. A. NORMAN, Appellant, v. C. P. HALL, Respondent.

BUILDING CONTRACT—IMPERFECT PERFORMANCE—RIGHT OF CONTRACTOR TO RECOVER DAMAGES FOR BREACH.—Where a building contractor put in a foundation which was defective in a substantial respect, and for that reason the owners refused to permit him to proceed with the work, he cannot recover damages for breach of the contract, although he contemplated putting in a new foundation, but did not because he received no assurance, in addition to that afforded by the original contract, that the second foundation would be accepted.

APPEAL from a judgment of nonsuit of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Aldrich & Gentry, for Appellant.

Abe P. Leach, and Harry E. Leach, for Respondent.

BURNETT, J.—This action was brought to recover damages claimed for the violation of a written contract for the construction of two certain buildings. Plaintiff proceeded no further than the completion of the foundation, but the basis of his action is that “said defendant, without any cause or reason, requested and ordered plaintiff to stop said work and not to proceed further with said contract and to suspend work upon said contract; and said defendant did then and there stop said plaintiff from performing said conditions and said work, and refused to allow plaintiff to proceed further with said work.” The appeal is from a judgment of nonsuit.

The “articles of agreement” under which the work was undertaken imposed upon plaintiff the duty to “perform and complete in a workmanlike manner all the work required to conform with the plans and specifications designated,” and it was provided that the services were to be “under the direction and supervision and subject to the approval of” the architect. The contract price was \$15,842, to be paid in four installments, the first payment of three thousand nine hundred dollars to be made “when the frames are completed and the roofs are sheathed.” It was further agreed “that when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from said architect, stating that the payment or installment is due or work completed as the case may be, and the amount then due; and the said architect shall at said time deliver said certificates under his hand to the contractor, or in lieu of such certificate, shall deliver to the contractor, in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects, if any, to be remedied to entitle the contractor to the certificate or certificates. And in the event of the failure of the architect to furnish and deliver said certificates, or any of them, or in lieu thereof the writing aforesaid, within three days after the times aforesaid, and after demand therefor made in writing by the contractor, the amount which may be claimed to

be due by the contractor, and stated in the said demand made by him for the certificate, shall at the expiration of said three days, become due and payable, and the owner shall be liable and bound to pay the same on demand."

There can be no legal objection to said provisions and it is apparent that they bear a reasonable relation to the rights both of the owner and the contractor. It is equally clear that, in order to recover, plaintiff must show that he complied with said terms or offered a sufficient excuse for his failure to do so. (*Coplew v. Durand*, 153 Cal. 278, [16 L. R. A. (N. S.) 791, 95 Pac. 38], and cases therein cited.)

There is neither evidence nor contention here that plaintiff obtained the architect's certificate to the effect that any part of the work had been completed in accordance with the contract, or that any demand was made therefor, or that sufficient work had been done to entitle plaintiff to the first payment designated in the agreement, or that plaintiff performed his work as required by the said plans and specifications. Indeed, as to this last consideration, all the evidence shows that the foundation constructed by plaintiff was defective and unfitted for the purpose intended. It was not built in a workmanlike manner and it did not measure up to the requirement of the contract. It was defective not in a trifling but in a substantial respect and defendant was under no obligation, therefore, to accept or pay for it. The imperfect condition of the work was called to the attention of plaintiff and he did not gainsay it. In fact, there seems to have been no substantial difference of opinion as to the inadequacy of the work that had been completed.

This situation demands both legally and morally that plaintiff, in order to recover compensation or to place defendant in default so that an action for damages could be maintained, must remedy the defect and make the foundation conform to the specifications unless prevented from so doing by the act of defendant. But the evidence is that the defect was not cured and there is no showing that the failure was through any fault of defendant.

Plaintiff contemplated putting in a new foundation, as appears from conversation which he relates as having occurred between him and the architect, Mr. McCall, as follows: "Mr. McCall says to me, 'Norman, what does it cost to take out

that concrete out of there and haul it away and renew it, that it will be trap rock?' I said, 'it will cost me \$530.' He says, 'Sooner than have any trouble, I would prefer to pay one-third of it.' I said 'All right, Mr. McCall, I will stand the other one. Are you satisfied, Mr. Whitmore (the sub-contractor) to stand yours?' He said, 'Yes.' " However, nothing further was apparently done in pursuance of that agreement and plaintiff assigns as his reason for not renewing the foundation that "they would not assure me whether they would accept the second one." It is perhaps needless to say that this afforded no legal excuse for his inaction. The written contract was the measure of the rights and obligations of the parties. Defendant was not required to give any additional assurance that he would comply with its terms and plaintiff could not demand it as a prerequisite to the fulfillment on his part of his covenants. He should have put the foundation in proper condition and gone on as required by the contract and the law would have afforded him redress if defendant had refused him justice.

The case, of course, would be different if defendant had repudiated the contract or interfered with the efforts of plaintiff to comply with his agreement. But the only fair inference from the testimony is that plaintiff was not precluded from earning the compensation provided for in said contract. Defendant's attitude was shown by his testimony that he told the architect to stop the contractor "until he could go ahead and do it according to specifications and do it so it would stand. I was willing to do it, and I didn't care when it would be but not if it was going to be any less, so I wanted a good substantial building."

We have not overlooked the familiar rule that applies in cases of nonsuit, but, as we view the matter, there is no substantial evidence here of the default of defendant. The judgment is, therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1175. Third Appellate District.—October 4, 1913.]

**R. A. CALDWELL, Appellant, v. THE REGENTS OF THE
UNIVERSITY OF CALIFORNIA, Respondent.**

DISMISSAL OF CASE—DELAY IN PROSECUTION—FAILURE TO SERVE SUMMONS WITHIN REASONABLE TIME.—Section 581a of the Code of Civil Procedure makes it mandatory upon the court to dismiss an action where summons has not been served and return thereon made within three years after the commencement of the action, but the court may, in the exercise of a sound judicial discretion, dismiss an action before the expiration of the three years, if there has been, under the circumstances of the case, an unreasonable delay in its prosecution.

ID.—ACTION TO QUIET TITLE—DISMISSAL FOR DELAY IN PROSECUTION.—Where an action is brought to quiet title to land ten years after an alleged void foreclosure sale, and a *lis pendens* is filed at the time of the commencement of the action, it is not a sufficient excuse for a delay of nineteen months in serving summons that the plaintiff required that time to raise the amount of money, for which the sale was made, to tender to the defendant, but which he claims he is not legally or equitably obliged to pay. The court does not, therefore, abuse its discretion in dismissing the action on the ground of unreasonable delay in its prosecution.

ID.—DUTY OF PLAINTIFF TO BE IN READINESS TO PROSECUTE ACTION.—A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for.

ID.—ACTION ATTACKING TITLE TO REAL ESTATE—DUTY TO PROSECUTE DILIGENTLY.—Where the record title to real property is challenged by an action at law or a suit in equity, it is the duty of the plaintiff to act with all proper diligence in bringing the question to issue in the court, so far as it is within his power to do so; and when he does not do so for a long period of time, that is to say, where he fails, for what appears to be an unreasonable length of time, to legally notify the party upon whose title he has thus made an assault that he has done so, he should not be excused for his neglect, where he is called upon to account for it, except upon a showing of the most satisfactory and conclusive character.

APPEAL from an order of the Superior Court of Alameda County dismissing an action for want of prosecution. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Frank W. Sawyer, for Appellant.

Warren Olney, Jr., for Respondent.

HART, J.—This is an appeal from a judgment entered upon an order dismissing the above-entitled action and from the order of dismissal.

The ground upon which the order of dismissal was made was want of diligence in the service of summons and consequent failure to prosecute the action with reasonable diligence.

The motion was supported by the affidavit of an officer of the defendant, setting forth the facts upon which the latter claimed to be entitled to favorable action upon said motion.

The plaintiff filed a counter affidavit, in which he details a history of the litigation of which the proceeding now before us is the outgrowth, and sets forth his reasons for postponing the service of summons.

These affidavits are incorporated into the record, which was made up in accordance with the provisions of sections 941a, 941b, and 941c of the Code of Civil Procedure.

The action, the purpose of which was to obtain a decree quieting, as against the defendant, the plaintiff's alleged title to certain real property situated in the city of Oakland, Alameda County, was commenced and summons issued on the sixteenth day of May, 1910, but the summons was not served upon the defendant up to the time of the noticing and filing of the motion to dismiss the action.

The affidavit of Victor H. Henderson, secretary of the defendant corporation, shows that his office, as well as those of the treasurer and president of said corporation, were during all of the time ever since the date of the institution of the action and the issuance of summons, maintained, respectively, on the grounds of the state university, in the city of Berkeley, at San Francisco and at the city of Sacramento. The affiant during all of said time was the secretary and maintained his office at the place above stated, and during the same period of time I. W. Hellman, Jr., was treasurer, and, by virtue of the provisions of the law, the governor of the state, whose office was and is at Sacramento, was president of said corporation. It is averred that these facts were well known in Alameda County to the general public and to all

persons having business or desiring to do business with the defendant or with the University of California, and that the existence and respective locations of said offices were recorded in the public directories, "and if the existence and location of said offices, or the identity of the individuals occupying the positions of such secretary, president and treasurer were not known to plaintiff and his attorney, such knowledge could have been immediately obtained by them by inquiry in said county of Alameda." The affidavit then avers that summons "in said action has not been served upon the defendant, and, as far as affiant is aware, no attempt has been made by the plaintiff, or his attorney, to serve the same; that it has always been possible and practicable for the plaintiff, or his attorney, without difficulty, to serve said summons personally on said defendant."

By his affidavit, counsel for the plaintiff does not deny that he was familiar with the fact of the existence and the respective locations of the executive officers of the defendant referred to in the defendant's affidavit, nor does he claim that, for any reason, he was precluded from securing legal service of summons upon the defendant corporation. The excuse for the delay in the service of summons is, however, stated in his affidavit, in substance, as follows: That, on or about the twenty-fourth day of July, 1900, the defendant corporation commenced an action in the superior court in and for the county of Alameda for the purpose of foreclosing a mortgage, executed on the land described in the complaint to secure an indebtedness in the sum of \$26,398.37, alleged to be due the said defendant from one W. A. Knowles and which indebtedness was evidenced by the promissory note made by said Knowles to the defendant on December 6, 1890; that in said foreclosure suit, said Knowles appeared by filing an answer, in which, among other things, he set up the plea of the statute of limitations as to all sums in excess of ten thousand dollars of said alleged indebtedness, and that at the trial of said action the court sustained the plea of the statute, and awarded the defendant here judgment in said action in the sum of ten thousand dollars, only, with interest and costs, aggregating the sum of \$16,276.66 $\frac{2}{3}$, "but in its order of sale under said foreclosure directed that the property be sold to pay the entire amount demanded in the complaint, to wit,

the sum of \$32,553.33," which included the principal of the original indebtedness and interest and costs; that at the sale under said judgment, sufficient property was sold by the commissioner appointed by the court for that purpose to pay the full amount demanded in the complaint, which, as is manifest, amounted to the sum of \$16,276.66 $\frac{2}{3}$ in excess of the amount awarded by the judgment against said Knowles. The plaintiff, it is stated in the affidavit, having acquired title to the property sold to satisfy such excess, commenced this action, not for the purpose of promoting litigation, but with the intention of making every possible effort to settle and adjust the matter out of court, and to that end "affiant advised the plaintiff to raise the necessary money to pay the defendant the full amount of its demand, to wit: \$32,553.33, with interest, taxes, liens, expenses and costs to date, and make full tender to the defendant of such sum, and demand a reconveyance of said property," notwithstanding that "the excess sale under said judgment was and is absolutely void and of no force or effect whatever"; that, "acting under said advice, effort has been made to raise that sum, with the result that plaintiff, on the 30th day of December, 1911, was ready and willing to make such tender and demand, and thereupon affiant wrote and mailed to the defendant the following letter." Then follows a copy of a letter addressed to the defendant by the affiant, attorney for the plaintiff, and dated December 30, 1911. In that letter he called attention to the invalidity of the "excess sale" of property whereby the whole of the indebtedness due from Knowles to the defendant was satisfied after the court, in the foreclosure suit, had found that the defense of the statute of limitations against all of said indebtedness in excess of the sum of ten thousand dollars was established, informed the defendant that the plaintiff had commenced an action against it and others to quiet title to the property, and offered, in consideration of a conveyance by the defendant to the plaintiff of the property sold by the defendant under the decree, to pay to the former the full sum of \$32,553.33, together with interest thereon, at the rate of seven per cent per annum, from the date of the decree of foreclosure.

That letter, proceeds the affidavit, was responded to by the defendant by letter, dated January 4, 1912, in which it was stated that plaintiff's letter had been turned over to Mr.

Warren Olney, Jr., attorney for the regents, "who has charge of legal matters affecting the Broadway Terrace Tract (the land in question was so named and known), the property of the regents."

Mr. Olney, so the affidavit states, replied to the letter of affiant by serving upon him a notice of the motion which is responsible for this appeal.

"The delay in this matter," concludes the affidavit, "was occasioned by an honest effort to raise the necessary money to do full and complete equity by the plaintiff to the defendant, and in an honest effort to adjust the matter without resort to trial and litigation in court."

By section 581a of the Code of Civil Procedure it is made mandatory upon the court to dismiss an action in which summons has not been served and return thereon made within three years after the commencement of such action. (*Bernard v. Parmalee*, 6 Cal. App. 537, 545, [92 Pac. 658], and cases therein cited.) In all other cases, whether there has been inexcusable delay in the prosecution of an action, is a question which the court, in the exercise of a sound judicial discretion, must determine from all the facts and circumstances of the particular case. "The code section (581a) does not mean that the plaintiff may have the full time in all cases. It is still discretionary with the court to dismiss, as before the amendment, even though summons be issued and served within time." (*Stanley v. Gillen*, 119 Cal. 176, [51 Pac. 183]; *Kreiss v. Hotaling*, 99 Cal. 386, [33 Pac. 1125]; *Bernard v. Parmalee*, 6 Cal. App. 537, [92 Pac. 658].)

So, in this case, in which less than three years intervened between the commencement of the action and the date of the filing of the motion to dismiss, the sole question is whether, under the facts as presented on the motion, the court, in ordering a dismissal on the ground of unreasonable delay in the prosecution of the action after it was commenced, transcended the bounds of a sound judicial discretion.

The affidavit of counsel for the plaintiff, in our opinion, contains nothing which even approximates a reasonable excuse for the long elapsion of time after the commencement of the action before attempting to start the cause to issue by the service of summons. The only reason which affiant offers as an

excuse for the delay in serving summons is, as seen, that he desired time within which to raise a large sum of money with which he might do an act, which, affiant declares, the plaintiff was not legally bound to perform as a prerequisite to his right to a decree quieting his title, if any he has, to the land. This is not a sufficient reason for excusing the delay. As well might it be claimed that a plaintiff, after bringing suit, could justly be excused for delaying service of summons and so postpone bringing the cause to issue for a year or two or a long period of time upon the ground that he first desired to procure evidence which would support the allegations of his complaint. A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for. If the plaintiff in this case, as he claims is true, was not legally or equitably obliged to pay the large sum mentioned in his affidavit to the defendant in order to secure the relief sought for by him, then there was no necessity for raising the money referred to, and, therefore, no occasion for the long delay in the service of summons. If, on the other hand, he conceived it to be requisite to offer and be prepared to pay said sum to the defendant, in order to obtain favor in the premises from a court of equity, if the facts otherwise entitled him to such favor, he should have been prepared to meet that equitable prerequisite before instituting his suit, or at least, before bringing suit, have placed himself in a situation whereby he could have so prepared himself within a reasonable time after he had filed his complaint. At any rate, assuming that the excuse offered by the plaintiff for his delay in causing summons to be served might, under some circumstances, possess merit, it certainly loses its force when it is considered that the alleged right of the plaintiff to the relief sought by his complaint is founded upon an alleged void foreclosure sale which occurred ten years prior to the commencement of this action. Presumably, the plaintiff and Knowles, from whom the first named acquired whatever rights he claims in the land in controversy, were, during all that period of time, and from the very beginning of the transaction from which this action arises, fully cognizant of the circumstances which rendered the sale void in part, if,

in truth, it was void. Thus it is readily to be noted that a period of nearly twelve years intervened between the date on which the cause of action upon which the plaintiff relies accrued to him or to his predecessor in interest and the time at which, after the action had been filed for nearly two years and the plaintiff notified of the intention of the defendant to make the motion with which this inquiry is concerned, any effort was made to bring the matter to issue in court. And if they were familiar with all the facts during all or even any considerable part of that time, it seems to us that there can be little, if any, support for the excuse set up by the plaintiff for allowing his action to remain dormant for a period of over a year and seven months after it was begun, thus leaving the question whether the defendant's record title to the land in controversy was valid or invalid in the air, so to speak, for the same period of time. The plaintiff, according to his attorney's affidavit, recorded a *lis pendens* in this case immediately upon the filing of the complaint. A *lis pendens*, upon its face, constitutes a cloud upon the title to the real property to which it relates. For nearly two years, then, the defendant's record title was under a cloud. Readily, therefore, must the importance of such a proceeding to one whose title is thus mixed up and complicated be appreciated. He should be given the earliest opportunity, consistent with the exigencies of the cause, to clear up the matter, if he can. Where, therefore, the record title to real property is challenged by an action at law or a suit in equity, it is the duty of the party thus attacking such title to act with all proper diligence in bringing the question to issue in the court, so far as it is within his power to do so, and when he does not do so for a long period of time—that is to say, where he fails, for what appears to be an unreasonable length of time, to legally notify the party upon whose title he has thus made an assault that he has done so, he should not be excused for his neglect, where, as here, he is called upon to account for it, except upon a showing of the most satisfactory and conclusive character. In this case, we think that the mere reading of the affidavit filed in behalf of the plaintiff in resistance to the motion to dismiss will make it perfectly clear to any reasonable person that the defendant has signally failed to sustain the burden cast upon him of reasonably accounting for and excusing the long delay in serving summons.

In any event, it cannot be said that, in granting the motion to dismiss, the court below abused the discretion committed to it in such matters.

The facts in the case of *Ferris v. Wood*, 144 Cal. 426, [77 Pac. 1037], cited by appellant, are entirely at variance with these here, as a reading of that case will show. But cases of this character must be determined wholly upon their own peculiar facts. As is said in *First Nat. Bank v. Nason*, 115 Cal. 626, [47 Pac. 595], where a similar motion is considered: "Each particular case presents its own peculiar features, and no iron-clad rule can justly be devised applicable alike to all."

The judgment and order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 3, 1913.

Beatty, C. J., dissented from the order denying a hearing in the supreme court.

[Civ. No. 1160. Third Appellate District.—October 8, 1913.]

S. B. HINES, Appellant, v. M. E. COPELAND, Respondent.

STATUTE OF FRAUDS—CONTRACT TO CONVEY LAND—SPECIFIC PERFORMANCE—PLEADING.—A complaint, in an action for the specific performance of a contract to convey land, which does not show that the contract is in writing, fails to state a cause of action and is demurrable.

ID.—CONTRACT TO CONVEY LAND—SUFFICIENCY OF WRITING—DESCRIPTION OF PROPERTY.—A writing relied upon to satisfy the statute of frauds in case of a contract to convey land must not only describe the property, but the description must be such as to facilitate, without the necessity of resorting to extrinsic or parol evidence, a ready identification of the property.

ID.—RECEIPT—SUFFICIENCY AS MEMORANDUM OF CONTRACT.—The following receipt for money paid on account of the purchase price of land does not satisfy the statute of frauds and will not support an action for specific performance of the contract to convey: "Fresno, Cal., April 20, 1913. Received of S. B. Hines one hundred dollars, deposit on 40 acres of land at \$2200.00. Mrs. M. E. Copeland."

ID.—SPECIFIC PERFORMANCE—CERTAINTY OF DESCRIPTION OF PROPERTY IN CONTRACT TO CONVEY.—Specific performance of an agreement to convey land will be decreed only where the land is so described in the contract that it may readily be identified from such description. The court must, in other words, be definitely made to know the precise property as to which the terms of the agreement are asked to be enforced. And such knowledge can be acquired only by those means or through that instrumentality prescribed by the law for the acquisition of such knowledge, that is, by and through such a writing as embraces all the essential features of the contract.

ID.—PART PERFORMANCE OF ORAL AGREEMENT—PART PAYMENT.—Mere payments on the purchase price are not sufficient to take an oral contract for the sale of land out of the statute of frauds. It is only where the payment is accompanied by a change of possession, or the expenditure of money on the land, on the faith of the oral agreement, and where the failure to perform by the vendor will work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of the deed.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Ernest Klette, for Appellant.

Drew & Drew, for Respondent.

HART, J.—This is an action for the specific performance of an alleged contract for the sale of real property.

The complaint alleges that, at the date of the execution of the alleged agreement, the defendant was the owner of one hundred and twenty acres of land situated in Fresno County, and described as "lots 21, 22, 23, 24, 25, and 26 of De Witt Colony, according to the map or plat of said colony on file and of record in the office of the county recorder of the county of Fresno, state of California"; that the defendant, on the twentieth day of April, 1911, agreed to sell and convey to the plaintiff, by a good and sufficient deed, "any forty acres of land that plaintiff should or might select, elect or choose to purchase, for the sum of \$2,200," etc.; that thereafter, and on or about the same day, the plaintiff went to said land and "then and there chose, selected and elected" to purchase

lots 23 and 24 of the land above described, and that he at that time made known to the defendant the fact of his selection of said lots and his election to purchase the same according to the defendant's agreement; that thereafter and on the same day, the plaintiff paid to the defendant the sum of one hundred dollars on the purchase price of the lots so selected by him, and that the defendant "then and there made, executed, and delivered to said plaintiff a writing, signed by said defendant, in the words and figures following, to wit:

"FRESNO, Cal. April 20, 1911.

"Received of S. B. Hines one hundred dollars, deposit on 40 acres of land at \$2200.00.

"MRS. M. E. COPELAND."

The complaint states that, after the execution of the foregoing receipt, the plaintiff, at various times, made payments in small amounts, so that the total amount paid by the plaintiff to the defendant on the purchase price of the land is \$393.30; that the defendant still retains said sum and has refused and still refuses to furnish the plaintiff with an abstract or certificate of title or a deed to the premises, although before the commencement of this action he demanded the same and tendered to the defendant the sum of \$1806.70, the balance due on the purchase price.

To the complaint the defendant interposed a demurrer, both general and special, and the court sustained the same, leave to amend having been denied upon the statement of the plaintiff in open court that he had no other or further agreement in writing than the one set forth in his complaint.

Judgment was thereupon entered in favor of the defendant, and this appeal is by the plaintiff from said judgment.

The complaint fails to state a cause of action for the specific performance of a contract for the sale of real property and the demurrer was, therefore, properly sustained.

Section 1624 of the Civil Code, among other things, provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged, or by his agent: . . . 5. For the sale of real property, or an interest therein." (See, also, Code Civ. Proc., sec. 1973.)

The agreement referred to in the third paragraph of the complaint is not shown to be in writing, and it follows that

that paragraph of the complaint wholly fails to state a cause of action for the relief demanded. And nothing could be clearer than that the writing set out in the complaint and upon which the plaintiff seems solely to rely for the support of his action does not satisfy the requirement of our statute of frauds, above quoted. It does not contain a description of the property to which it purports to relate, and thus it is wanting in one of the first essentials of an agreement for the sale of real property to render it valid or subject to recognition either at law or in equity. Not only must there be a description of the property which is the subject of the agreement, but the description must be such as to facilitate, without the necessity of resorting to extrinsic or parol evidence, a ready identification of the property. As seen, the complaint declares that the defendant is the owner of six different and distinct lots of land situated in De Witt Colony, Fresno County, and that the forty acres to which the plaintiff claims to be entitled to a deed, by virtue of the alleged agreement of sale, is a part of said lots; but, even if this be true, the writing upon which the demand for the relief prayed for is founded does not so describe the forty acres as to convey even the remotest notion as to which of the several lots mentioned embrace or constitute the forty acres. In other words, it cannot be determined from the writing what particular forty acres the defendant agreed to sell out of the several pieces of land which the complaint states she owns in De Witt Colony. And, taking the writing by itself, unexplained or unaided by the allegations setting forth the oral negotiations of the parties, it cannot be told therefrom whether the land referred to therein is any part of the six lots referred to. Indeed, so far as the writing itself discloses any information as to its location, the land it refers to may be situated in some other part of Fresno County, or, for that matter, in some other county.

An action based upon such an agreement, whether it be one at law for damages for its breach or one in equity for a specific enforcement of its terms, cannot, of course, be sustained. The remedy by specific performance, which is invoked in this case, obviously means that, where an agreement to sell property has been broken, the party seeking the remedy is entitled only to a decree compelling the other party to convey to him the identical or specific property which he agreed to convey, and that this

may be done, the land must in the very nature of the case, be so described in the agreement whose terms are thus sought to be enforced as that it may readily be identified from such description. The court must, in other words, be definitely made to know the precise property as to which the terms of the agreement are asked to be enforced. And such knowledge can be acquired only by those means or through that instrumentality prescribed by the law for the acquisition of such knowledge—that is, by and through such a writing as embraces all the essential features of the contract.

As is said in *Breckinridge v. Crocker*, 78 Cal. 529, 534, 535, [21 Pac. 179, 181]:

“In order to take a contract for the sale of land out of the statute of frauds, it is not necessary that there be a formal contract, drawn up with technical exactness. A memorandum of the agreement is sufficient, and it may be found in one or more papers, some or all of which may be telegrams. But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is, and when it is to be paid, and must so describe the land that it can be identified.”

There are many California cases in which the essentials of an agreement to sell real property, to take it out of the statute of frauds, are clearly pointed out and, we think, show that the one here is wholly insufficient to satisfy the statute. *Craig v. Zelian*, 137 Cal. 105, [69 Pac. 853], is instructive upon this proposition. There the writing pleaded and relied upon read, after the date: “Received of Wm. Craig and James Marlow the sum of \$20.00, twenty dollars, in part payment for a strip of land in front of Golden Rule Store and Stent Market. The purchase price of said lot to be \$150.00, one hundred and fifty dollars,” signed by the defendant. The action was for damages for the breach of the contract. The court, holding that the writing was insufficient to take the case out of the statute of frauds because the description of the land was too vague and indefinite, said:

“An agreement for the sale of real property must not only be in writing and subscribed by the party to be charged, but the writing must also contain such a description of the property agreed to be sold, either in terms or by reference, that it can be ascertained without resort to parol evidence. Parol evi-

dence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing. . . . The statute of frauds was originally enacted 'for the prevention of frauds and perjuries,' and an agreement for the sale of land is required to be in writing in order that this purpose may be accomplished. The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence. A description of the land intended to be conveyed is one of the most essential parts of the agreement, and must be contained in the writing."

There are numerous cases from other jurisdictions which illustrate the application of the rule as it is stated and applied by the above California cases. (See *Reptii v. Maisak*, 6 Mackay (D. C.), 366; *Rollin v. Pickett*, 2 Hill (N. Y.), 552; *Baldwin v. Kerlin*, 46 Ind. 426; *Müller v. Campbell*, 52 Ind. 125; *Taney v. Batchell*, 9 Gill. (Md.) 205; *Cooley v. Lobdell*, 82 Hun, 98, [31 N. Y. Supp. 202]; *Murdock v. Anderson*, 57 N. C. 77; *Ives v. Armstrong*, 5 R. I. 567; *Humbert v. Brisbane*, 25 S. C. 506; *Nippolt v. Kammon*, 39 Minn. 372, [40 N. W. 266].)

While there is no claim made in the brief by counsel for the plaintiff that he is in any event entitled to a specific enforcement of the agreement on the ground of part performance (Code Civ. Proc., sec. 1972), yet, as we have shown, the complaint alleges payments made on the alleged purchase price of the specific parcel of land of which the plaintiff alleges that he became the purchaser under the alleged contract with the defendant, and the inference from those allegations is that such payments constitute part performance, and should be so regarded. That mere payments on the purchase price of the land are not sufficient to take an oral agreement for the sale of land out of the statute of frauds, is well settled. (*Forrester v. Flores*, 64 Cal. 24, [28 Pac. 107].) In that case, the plaintiffs sought the specific enforcement of an oral agreement by the defendant to sell certain real property to the plaintiffs on the ground of part performance, the complaint alleging that the latter had fully performed the agreement on their

part by paying the entire purchase money, but that the defendant, although he had taken and kept the money, refused to execute and deliver to the plaintiffs a deed to the property. The answer of the defendant made no denial of the allegations of the complaint as to the payment of the purchase price, and by reason of that fact, the plaintiff asked for a judgment on the pleadings, which motion was denied, and judgment thereupon entered for the defendant. Upholding the judgment, the supreme court said: "And although there was no denial of the allegations as to the payment of the money, yet no inference could be drawn, from the fact of payment, that the moneys were paid to the defendant on account of and in the performance of the alleged agreement. Besides, if such an inference could be drawn from the fact, neither the fact, nor the inference, nor both together, would amount to such proof of part performance as would take the parol agreement out of the statute of frauds; for the mere payment of the purchase money of such agreement is not, according to the general practice in courts of equity, sufficient for that purpose. 'By an unbroken current of authorities running through many years, it is settled, too firmly for question, that payment, even to the whole amount of the purchase money, is not to be deemed part performance so as to justify a court of equity in enforcing the contract.' (Browne on Frauds, sec. 461; Fry on Specific Performance, sec. 403; Story's Equity Jurisprudence, sec. 761.) It is only where the payment is accompanied by a change of possession in the land, or the expenditure of money upon it, on the faith of the oral agreement, and where the failure to perform by the vendor would work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of a deed. (Story's Equity Jurisprudence, sec. 761.) For money paid under an invalid contract, the party who pays has an adequate remedy at law."

The facts in the cases cited by the plaintiff distinguish them from this. For instance, in the case of *Preble v. Abrahams*, 88 Cal. 245, [22 Am. St. Rep. 301, 26 Pac. 99], the agreement contained in the writing upon which the plaintiff relied was that the vendors would sell to "A. Abrahams, of Reno, for \$125.00 per acre, for forty acres of the eighty-acre tract at Biggs," etc. The writing was dated, "Biggs, January 13,

1888," from which it was readily to be inferred that there was a town or settlement known by that name and readily susceptible of identification. All that was required to locate or identify the land, as it was thus described in the writing, was to ascertain whether the vendors owned an eighty-acre tract, distinct from any other tract, at or in the immediate neighborhood of the town or settlement of Biggs, and, as is suggested by counsel for the defendant here, this could easily be done by reference to the public county records. Besides, it is to be assumed that the use of the definite article "the" immediately preceding the words, "eighty-acre tract," was intentional, and for the express purpose of describing a particular tract of land consisting of that number of acres, situated "at Biggs." Moreover, the use of the article "the" as it appears in the sentence referred to, implies that the vendors were the owners of but one eighty-acre tract at Biggs; so, as the supreme court in that case said: "If the vendors owned an eighty-acre tract at Biggs, we assume that they intended to sell forty acres of the eighty-acre tract owned by them at Biggs." If, therefore, parol testimony was admitted to disclose the precise location of said tract, its purpose was not to correct an insufficient description, but merely to locate the land by the description as given of it in the writing. (*Crozer v. White*, 9 Cal. App. 612, 616, [100 Pac. 130].)

The other cases cited by the plaintiff need not be specially reviewed here. Many of them are from other jurisdictions and two are the following California cases: *Towle v. Carmelo L. & C. Co.*, 99 Cal. 397, [33 Pac. 1126]; and *Carr v. Howell*, 154 Cal. 372, [97 Pac. 885]. An examination of the California cases will disclose that they are very much different from this case as to the facts.

Our conclusion is, as must be apparent from the foregoing, that the alleged written agreement upon which the plaintiff declares, and upon which he must rely if he would succeed at all in sustaining his action, falls very far short of measuring up to the requirements of the statute of frauds, and that it, cannot, therefore, be upheld either at law or in equity.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 438. First Appellate District.—October 15, 1913.]

THE PEOPLE, Respondent, v. **ROBERT BRADLEY**, Appellant.

CRIMINAL LAW—HOMICIDE—SHOOTING POLICE OFFICER BY PERSON UNDER ARREST.—Where a special policeman in plain clothes arrests a man on suspicion, without force or show of force, and without revealing his identity as a peace officer, and the prisoner, while walking with the officer to the jail, suddenly turns into an alley and shoots the officer, the killing is not justified nor reduced from murder to manslaughter.

ID.—EVIDENCE—STATEMENT OF EYE WITNESS—TRANSCRIPT OF REPORTER'S NOTES.—If it is expressly stipulated at the trial for such homicide that the transcription of the shorthand notes of a statement, made to the district attorney in the presence of the defendant by an eye witness to the killing, may be read in evidence in lieu of the reporter testifying from his notes as to the interview, a motion thereafter to strike out the same as hearsay is properly denied.

ID.—MOTION TO STRIKE OUT EVIDENCE—NECESSITY OF PREVIOUS OBJECTION.—A motion to strike out evidence must be based upon an objection previously stated, if opportunity to object presented itself.

ID.—EVIDENCE—ACCUSATORY STATEMENTS MADE IN PRESENCE OF ACCUSED.—In a prosecution for homicide accusatory statements, made in the presence and hearing of the defendant by a person not called as a witness, are admissible in evidence for the single purpose of showing that the defendant's conduct in response to the accusation was not that of an innocent man, or that his statements in reply implicated him in the commission of the crime charged against him.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

T. L. Christianson, and William H. H. Gentry, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LENNON, P. J.—The defendant in this case was charged with the crime of murder. Upon his trial he was convicted of

murder in the first degree, and subsequently sentenced to life imprisonment in the state prison. He has appealed from the judgment, and from an order denying him a new trial.

The defendant did not take the witness stand in his own behalf, and the case was submitted to the jury upon his plea of not guilty, and the evidence adduced by the people.

The facts of the case upon which the people secured a conviction are briefly as follows: On the day of the homicide, the defendant, in company with a companion, encountered the deceased, a special policeman, at the corner of East Twelfth Street and Thirteenth Avenue, in the city of Oakland. The deceased, who was in plain clothes and without any insignia of his office, halted the defendant and his companion with the command "Come here." The minor circumstances attending the meeting of the defendant and the deceased, as detailed by the companion of the defendant, need not be narrated. It will suffice to say that apparently they aroused the suspicions of the deceased as to the character of the defendant, and that a partial search of the defendant by the deceased resulted in the discovery of an ordinary head cap in the pocket of the defendant. The defendant's possession of this cap, his explanation of how he became possessed of it, and his conduct generally evidently confirmed the suspicion existing in the mind of the deceased which undoubtedly had impelled him to hail and halt the defendant in the first instance. Finally, the deceased said to the defendant, "You are under arrest," or "Come with me to the lock-up." The defendant at first submitted to arrest, and proceeded quietly with the deceased for a short distance, until they came to an alley, whereupon the defendant suddenly turned into the alley and immediately cried out to the deceased, "Come on and have it out." Without more ado the defendant fired two shots from a revolver at the deceased, both of which struck the deceased and killed him instantly. The search of the defendant was accomplished by the deceased without resorting to any more force than was necessary to unbutton the coat of the defendant; and the evidence before us does not disclose that the deceased at any time before, during, or after the arrest resorted to even a display of his club or pistol for the purpose of enforcing his authority or preventing the escape of the defendant.

The defendant fled from the scene of the crime, and was not apprehended until several months later. At the time of his arrest the defendant endeavored surreptitiously to rid himself of a loaded revolver, which was subsequently shown to be the weapon with which he killed the deceased.

We are satisfied that the evidence is amply sufficient to support the verdict of the jury finding the defendant guilty of a willful and malicious murder. Not even the semblance of a legal excuse is shown for the killing of the deceased. It may be conceded that the evidence does not show that the arrest of the defendant was authorized, and that, therefore, it was a trespass against the person of the defendant, which might have been rightfully resisted with the same degree of force employed in making the arrest. The evidence, however, affirmatively shows that no force or show of force was resorted to by the deceased at any time. The mere fact that the deceased failed to reveal his identity as a peace officer, and the further fact that the arrest was apparently unauthorized and not made in strict accord with the forms required by law, may have justified the defendant in breaking the arrest, but such facts alone were wholly inadequate either to justify the killing of the deceased or to reduce such killing from murder to manslaughter. *^* (*People v. Pool*, 27 Cal. 573; *Keady v. People*, 32 Colo. 57, [66 L. R. A. 353, 74 Pac. 893].)

It is insisted that the trial court erred to the prejudice of the defendant in permitting one Milton Schwartz, a stenographic reporter, to read as a witness for the people a transcription of his shorthand notes of a statement made to the district attorney in the presence of the defendant by one John H. Rector, who was an eye-witness to the killing of the deceased but who was not called as a witness at the trial. Immediately after the witness Schwartz was sworn, the district attorney announced that it was his purpose to show by this witness that the defendant, in response to the statement of Rector, had admitted killing the deceased. No objection was interposed at any time to the testimony of the witness Schwartz, or to the reading by him of the transcription of his shorthand notes of what was said and done by Rector and the defendant at the interview of Rector in the office of the district attorney. In fact, counsel for the defendant was the first to suggest and stipulate that the witness Schwartz might

read from his transcription, in lieu of testifying, from his notes of that interview. The sum and substance of Schwartz's testimony was that Rector had stated in the presence of the defendant that he, Rector, had seen the defendant fire two shots from a revolver into the body of deceased; that the defendant did not deny the accusation that he had fired the shots which killed the deceased, but did request and was granted permission to question Rector, and thereupon asked, among other questions, the following: "Can you say how far back in the alley I was when I shot him?"

When the witness Schwartz had concluded the reading of his shorthand notes counsel for the defendant moved the trial court to strike out all that was narrated by the witness upon the ground in effect that the testimony of the witness, in so far as it purported to narrate the statements of Rector, was hearsay, and that the question put by the defendant to Rector could not be construed as an admission of guilt.

The motion to strike out was denied; and when stating its reasons for the ruling the trial court practically charged the jury that the statement of Rector as detailed by the witness Schwartz was admissible only for the purpose of showing "the conduct of the defendant upon those statements being made in his presence . . . to show the conduct of the defendant with reference to the statements . . . and what he had to say."

The motion to strike out was properly denied. A motion to strike out evidence must be based upon an objection previously stated (*People v. Long*, 43 Cal. 444). This, of course, assumes that an opportunity to object presented itself, as it did in the present case. The record before us shows that counsel for the defendant not only failed in the presence of ample opportunity to object to the testimony now complained of, but expressly stipulated that it might be received for the purpose for which it was offered. For these reasons alone the defendant will not now be heard to complain of the ruling denying the motion to strike out. But apart from these considerations the statement of Rector, even though it was in part hearsay, was admissible under the exception to the general rule which permits in evidence accusatory statements made in the presence and hearing of the defendant by a person not called as a witness, for the single purpose of

showing that the defendant's conduct in response to the accusation was not that of an innocent man, or that his statements in reply implicated him in the commission of the crime charged against him. (*People v. Teshara*, 134 Cal. 542, [66 Pac. 798]; *People v. Philbon*, 138 Cal. 530, [71 Pac. 650]; *People v. Weber*, 149 Cal. 325, [86 Pac. 671].)

Counsel for the defendant contends that the question put to Rector by the defendant was not an unequivocal admission of guilt and was susceptible of a different construction. This is but an argument against the weight of the evidence rather than its admissibility; and it was for the jury to determine whether or not under all of the circumstances the language of the question involved an admission of guilt.

We have examined the other points made in support of the appeal. They are not well taken, and are not of sufficient merit to warrant a discussion of them.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 450. First Appellate District.—October 15, 1913.]

THE PEOPLE, Respondent, v. WILLIAM STIRGIOS,
Appellant.

CRIMINAL LAW—BURGLARY—SUFFICIENCY OF EVIDENCE.—The evidence in this prosecution for burglary not only warrants but compels the conviction of the defendant.

ID.—ADMISSIONS OF DEFENDANT—DURESS OR PROMISE OF REWARD.—Certain incriminatory statements and admissions of the defendant are not shown to have been induced by duress and promise of reward, but the most that can be said is that the record shows a decided conflict in the evidence.

ID.—SPECIFIC INSTRUCTION TO JURY—NECESSITY FOR REQUEST.—A charge to the jury is not open to attack on the ground that it fails specifically to cover a particular point in the case which the defendant deems pertinent and material, if no request for such instruction has been made.

ID.—WITNESS—CROSS-EXAMINATION—ADMISSION OF CONVICTION OF FELONY.—When a witness for the defendant in a criminal prosecu-

tion admits on cross-examination that he has been convicted of a felony by pleading guilty thereto, an objection to a question by the defendant calling for the reasons which induced the witness to plead guilty, is properly sustained.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. William H. Donohue, Judge.

The facts are stated in the opinion of the court.

T. L. Christianson, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

LENNON, P. J.—This is an appeal from a judgment of final conviction and from an order denying a new trial in a case wherein the defendant was convicted of the crime of burglary in the first degree.

The evidence upon the whole case not only warranted but compelled the conviction of the defendant.

The record does not support counsel for the defendant in the claim that certain incriminatory statements and admissions of the defendant were shown to be induced by duress and promise of reward. Upon this phase of the case the most that can be said for the defendant is that the record shows a decided conflict in the evidence.

The law of the case generally was fully, fairly, and correctly covered by the trial court in its charge to the jury. If counsel for the defendant deemed it essential that the jury should be specifically instructed upon any particular phase of the case it was his privilege and duty to request such an instruction. In the absence of such a request the charge to the jury is not open to attack on the ground that it failed to specifically cover a particular point in the case which counsel for the defendant deemed pertinent and material to the question of defendant's guilt or innocence.

A witness for the defendant admitted on cross-examination that he had been convicted of a felony by pleading guilty thereto. Neither the merits nor demerits of the confessed conviction, nor the reasons which induced the plea of guilty upon which such conviction was founded, were relevant to the

issues upon which the defendant in the present case was being tried, and therefore the lower court ruled correctly when it sustained an objection to a question by counsel for the defendant which called for the reasons which induced the witness to plead guilty.

The remaining points made in support of the appeal have been considered by us. They are absolutely without merit, and wholly undeserving even of mention.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 436. First Appellate District.—October 20, 1913.]

THE PEOPLE, Respondent, v. JAMES WING, Appellant.

CRIMINAL LAW—BURGLARY—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.—In this prosecution for burglary the fact that the defendant had the property in his possession shortly after it was stolen and made contradictory statements as to how he obtained it, together with his contradicted testimony as to his whereabouts at the time of the commission of the offense, not to mention other suspicious incidents, were sufficient to support a verdict of guilty.

ID.—EVIDENCE—IDENTIFICATION OF STOLEN ARTICLES.—The exhibits admitted in evidence on the trial were sufficiently identified as the property of the business concern burglarized; some of them being positively identified as having been taken from the store, and others being shown to be of a similar brand and make to those handled in the store burglarized.

ID.—MOTION FOR A NEW TRIAL—CONTINUANCE—DISCRETION OF COURT IN DENYING.—The court committed no abuse of its discretion in denying the defendant's last application for a continuance of the hearing of his motion for a new trial, where it had already granted three continuances of the motion, the last of which took the matter up to within one day of the time which the court could have granted the defendant under the provisions of section 1191 of the Penal Code without nullifying the verdict.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

J. K. Ross, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was charged by information with the crime of burglary. He was found guilty of that offense in the first degree, and sentenced to imprisonment for a term of eight years. From the judgment and from his motion for a new trial defendant prosecutes this appeal.

For a reversal of the judgment defendant depends principally upon his point that the evidence does not sustain the verdict of the jury. This position is not maintainable. A certain business concern was burglarized in San Francisco on the night of July 8, 1912. In September of the same year a detective of the police department, while investigating another charge against the defendant, found in his possession the articles stolen on the night of July 8th. Defendant admitted that he received these goods on July 18th, but at the trial claimed that he had purchased them from a man named Dewey. The articles admitted in evidence against the defendant were amply identified as those which were stolen on July 8th from the said concern; and as defendant came into possession of them ten days later, the fact of his being in possession of recently stolen property was clearly before the jury. Dewey, the man from whom defendant claimed to have purchased this property, was not satisfactorily identified, nor was he called as a witness by the defendant. Moreover a witness for the people testified that the defendant had told him that he had bought the goods in Fresno a year before, and defendant was also contradicted in his testimony, that on the night of the commission of the crime he was in the city of Stockton, by the proprietress of the hotel where he lived, who testified that on the night of July 8th he occupied his room in the hotel conducted by her in San Francisco.

The jury evidently gave no weight to the defendant's testimony that he was in Stockton on that night, and believed the testimony of the hotelkeeper. That circumstance, with the fact that he had in his possession the property shortly after it was stolen, together with the further circumstance that he

had made contradictory explanations or statements of how he had come into its possession—not mentioning other suspicious incidents—were, we think, amply sufficient to support the verdict of the jury.

The exhibits which were admitted in evidence were sufficiently identified as being the property of the concern burglarized. Some of them were positively identified as being taken from the store; others were shown to be of a similar brand and make to those handled in the store burglarized, in common, however, with other stores. The rulings of the court in admitting this evidence were not erroneous by reason of insufficient identification. (*Woodruff v. State* (Tex. Cr.), 20 S. W. 573; *Mitchell v. State*, 94 Ala. 68, [10 South. 518]; *Underhill on Criminal Evidence*, secs. 47, 379.)

Defendant is mistaken in saying that the trial court failed to instruct the jury as to the law upon circumstantial evidence. The record shows that the jury were carefully and fully instructed on that subject.

The court committed no abuse of its discretion in denying defendant's last application for a continuance of the hearing of his motion for a new trial. It had already granted three continuances of the motion, the last of which took the matter up to within one day of the time which the court could have granted defendant under the provisions of section 1191 of the Penal Code without nullifying the verdict. The continuance requested was for an indefinite time; and if it had been granted for more than one day the terms of section 1191 of the Penal Code, would, as just stated, have been violated, and the court rendered powerless to pronounce judgment. The purpose of this section was to expedite the hearing of appeals in criminal cases; and the defendant having been given a reasonable opportunity to prepare for the hearing of his motion it follows that the denial of a further postponement was proper.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Crim. No. 437. First Appellate District.—October 20, 1913.]

THE PEOPLE, Respondent, v. JAMES WING, Appellant.

CRIMINAL LAW—BURGLARY—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.—In this prosecution for burglary of a room from which were taken wearing apparel, jewelry and other articles, evidence that shortly after the commission of the crime the defendant was found in possession of some of the stolen goods, together with other incriminating testimony, was sufficient to support the verdict of guilty.

ID.—MISCONDUCT OF COURT IN ORDERING WITNESS INTO CUSTODY—REVIEW ON APPEAL.—The defendant in such case cannot complain on appeal of the action of the trial court in ordering, in the presence of the jury, one of his witnesses into custody on a pending misdemeanor charge, thus discrediting the witness, if the defendant did not call such person as a witness, nor assign the action of the court as misconduct.

ID.—IMPROPER ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO PRIOR CONVICTION.—The statement of the district attorney, in his argument to the jury, that the defendant was in the habit of getting burglaries committed, and had been convicted of a felony, was not prejudicial, if a prior conviction of the defendant was developed on his cross-examination, and the court was not requested to instruct the jury to disregard the remark.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

J. K. Ross, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was convicted of the crime of burglary in the second degree, and sentenced to serve a term of five years in the state penitentiary, the sentence to run concurrently with a previous sentence for a similar crime. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial.

Defendant makes the point that the verdict is contrary to the evidence.

Very briefly the evidence introduced by the people shows that a room of the prosecuting witness was burglarized on the 7th day of September, 1912, and from it there were taken wearing apparel, jewelry, a razor and a pawn ticket for a diamond ring. Notwithstanding that the defendant and a friend of his called Kelly occupied rooms in another building in San Francisco (the crime being committed in that city), the defendant just prior to the seventh day of September rented a room in the Hotel Belvedere adjoining the room of the prosecuting witness; and in the morning of the burglary, at about 11 o'clock, the defendant and associates of his were seen near the room of said witness, and at about that time one of the defendant's callers was noticed leaving the building with a large bundle, which looked like a bundle of clothes. On the same day, when the defendant was questioned by detectives of the police department concerning the crime, he claimed to know nothing about it; yet when he was searched part of the stolen jewelry was found on his person, and the wearing apparel was later found in the rooms which he occupied with Kelly. True, he offered an explanation of how he came into possession of the articles; but the jury evidently disbelieved his explanation, and adopted as true the evidence introduced by the people, drew legitimate inferences therefrom, and arrived at their conclusion of the guilt of the defendant. We think it is plain that the evidence supports their verdict.

Defendant's next point is stated to be that the jury received evidence out of court. It is based upon the assertion that the court ordered one of the defendant's witnesses into custody of the sheriff on a misdemeanor charge pending in the superior court on appeal, and that this was done in the presence and hearing of the jury, and discredited the witness to such an extent that the defendant was prevented from using her evidence.

Of course, the defendant was not prevented from calling such person as a witness, although he may have considered it more prudent not to do so; and leaving out of consideration the conflict in the affidavits introduced by the people and defendant respectively on the latter's motion for a new trial upon this feature of the case, the defendant not having called

such person as his witness, nor assigned the alleged action of the court as misconduct, is in no position now to complain.

Defendant also assigns as prejudicial error the conduct of the district attorney who, in his argument to the jury, used the following language: "He (referring to the defendant) was in the habit of getting burglaries committed—planning burglaries. Twelve men chosen as jurors have tried him and convicted him of a felony."

It appears that the defendant took the stand in his own behalf, and on cross-examination it was shown that he had been convicted of a felony. While we think the district attorney had no right to go into details of the other case, still we are unable to say that the observation of the district attorney prejudicially affected the defendant's case; and this must have been the view of the defendant, for the incident was not assigned as misconduct, nor was the court requested to instruct the jury to disregard the remarks.

There are other assignments of error in defendant's brief, but each of them has less merit than those already discussed, and are consequently unworthy of detailed notice.

The judgment and order appealed from are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1274. First Appellate District.—October 21, 1913.]

W. B. McGERRY & COMPANY (a Corporation), Respondent, v. PATRIZIO MARSICANO, Appellant.

REAL ESTATE BROKERS—VALUE OF SERVICES—RATE FIXED BY BOARD OF BROKERS.—In an action by a broker to recover the reasonable value of services in leasing real property, a resolution of the real estate board of brokers in the city, establishing a scale of commissions to be charged by brokers in negotiating leases, is admissible in evidence, and, together with positive and uncontradicted testimony of a witness that such rate is reasonable and customary, is sufficient to support a finding in favor of the plaintiff.

ID.—QUESTIONS OF FACT—CONCLUSIVENESS OF DETERMINATION BY TRIAL COURT.—The power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling when substantial evidence exists to support its finding.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Clarence A. Raker, Judge presiding.

The facts are stated in the opinion of the court.

John L. Roche, for Appellant.

Sullivan & Sullivan and Theo. J. Roche, for Respondent.

KERRIGAN, J.—This action was brought to recover the sum of \$8,865.00 for services performed by the plaintiff corporation as broker in negotiating a lease of real property in San Francisco belonging to defendant. Judgment went for plaintiff for the full amount demanded in the complaint. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The lease negotiated by plaintiff was for a period of twenty-five years, and by its terms the rent for the first five years was to be one thousand five hundred dollars per month, or eighteen thousand dollars a year; for the second period of five years the monthly rent was to be one thousand seven hundred and fifty dollars, aggregating for that period one hundred and five thousand dollars; for the third period of five years the monthly rental was two thousand dollars, making for that period of time the sum of one hundred and twenty thousand dollars; for the remaining ten years of the lease the monthly rental was two thousand two hundred dollars, amounting in that time to two hundred and sixty-four thousand dollars. The total of the rent thus reserved to the defendant under the lease amounted to the sum of five hundred and seventy-nine thousand dollars. In addition to the obligation to pay this amount the lessee was to erect a building upon the leased land which, at the expiration of the term, was to become the property of the lessor. Furthermore, all taxes and other charges against the property were to be paid by the lessee.

Plaintiff's claim for compensation for its services in negotiating said lease was based upon a percentage of two and one-half on the first year's rental, amounting to the sum of four hundred and fifty dollars, and one and one-half per cent

on the rental for the remainder of the term, amounting to eight thousand four hundred and fifteen dollars, making a total of eight thousand eight hundred and sixty-five dollars. This amount was claimed by the plaintiff to be the reasonable value of the services rendered by it for the benefit of the defendant.

It was claimed by the defendant at the trial, as it is now claimed here, that when he employed the plaintiff to effect the lease it was agreed that no commission was to be paid by him, but that the plaintiff should look to the lessee for compensation for its services. Plaintiff denied that any such agreement existed, and the evidence produced at the trial *pro* and *con* upon this question made a substantial conflict, the determination of which by the trial court, counsel for defendant concedes, is binding upon this tribunal under a well established rule.

It is contended, however, by defendant that the evidence was entirely insufficient to justify the decision of the court in allowing the plaintiff more than fifteen hundred dollars, the amount of the first month's rent under the lease, which the president of the plaintiff corporation admitted it was willing to take rather than have a lawsuit and the attendant expense of the employment of attorneys.

The evidence shows that shortly after the earthquake and fire of 1906 the real estate board of brokers in San Francisco passed a resolution, attempting to establish a scale of commissions to be charged by brokers for negotiating leases of real property; and the president of the plaintiff acknowledged, when his deposition was taken prior to the trial, that the plaintiff's charge in this case was based upon that resolution. Defendant insists that a customary rate cannot be shown in this manner, and cites the case of *Laver v. Hotaling*, 115 Cal. 613, [47 Pac. 593], where a charge made by an architect upon such a basis was held to be unwarranted as to those who had not made the resolution a part of their contract; and that no one is held to make it a part of his contract unless charged with knowledge of it. In that case the judgment was upheld upon the ground that there was evidence that the customary and reasonable rate of charge was the same as the one established by the resolution of the architects' association. The very character of evidence held to be necessary in the *Laver*

case was produced by the plaintiff in this case. Four witnesses, real estate brokers, including the president of the plaintiff (the person who negotiated the lease) testified that the usual and customary charge and a reasonable charge in San Francisco for services such as those rendered by plaintiff, at the time of their rendition, was two and one-half per cent on the first year's rental and one and one-half per cent on the rental for the remainder of the term. Defendant's counsel admits that, standing alone, the direct evidence of these witnesses would support the finding of the court as to the value of the services rendered; but claims that taken in connection with their cross-examination the basis of their estimates of value cannot be upheld; that such estimates are fallacious and cannot be relied upon because based upon grounds illusory and unsubstantial. In this he is partly supported by the record as to some of the witnesses; but the testimony of witness McGerry is positive as to the charge being reasonable, usual and customary, and this witness was not cross-examined upon this point, and his testimony is nowhere in the record at all impaired.

Besides this, the defendant had an opportunity of presenting witnesses to prove that the charge was not reasonable nor customary, but he failed to produce a single witness to disprove this claim of the plaintiff.

From all the testimony presented the trial court found the sum sued for to be a reasonable charge; and we are constrained to say that the record presents sufficient evidence to support this conclusion.

The power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling when substantial evidence exists to support its finding. (*Reay v. Butler*, 95 Cal. 206, [30 Pac. 208].)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1145. Third Appellate District.—October 21, 1913.]

**THOMAS PFOH, Appellant, v. EDWIN G. PORTER et al.,
Respondents.**

SALE OF GRAPES—IMPLIED WARRANTY OF QUALITY.—Where grapes are sold while on the vines, and the seller is informed that the buyer intends them for table use, a warranty is presumed that the grapes when delivered will be fit for such use.

ID.—EXECUTORY CONTRACT—GRAPES ON VINE—DAMAGE FROM RAINS.—Where grapes are sold on the vines before they are ripe, to be picked and delivered at a railway station and then be paid for at a specified price per ton, the contract is executory, so that if the grapes are injured by rain before picking or delivery, the loss does not fall on the buyer.

ID.—ACTION FOR PRICE—AMENDMENT OF PLEADING.—In an action by the seller to recover on such contract, the court properly refuses permission to amend the complaint "according to the evidence" and "set up a contract of absolute sale."

ID.—MOTION TO REOPEN CASE FOR FURTHER EVIDENCE—WHEN PROPERLY DENIED.—A motion to reopen the case in order that the plaintiff may offer additional evidence is properly denied, where not supported by affidavit or other evidence justifying his omission to offer the evidence before the submission of the case, and where the evidence, if received, cannot produce a different result.

APPEAL from a judgment of the Superior Court of Butte County. John C. Gray, Judge.

The facts are stated in the opinion of the court.

J. R. King, for Appellant.

Geo. F. Jones, for Respondents.

BURNETT, J.—The action was brought to recover the sum of \$496.35, alleged to be due on one original and two assigned claims for grapes sold to defendants. The three counts of the complaint are similar in their allegations as to the terms of the contracts and as to the injury done to the grapes by rain, as follows: "That on or about the 20th day of August, 1912, at Gridley, county of Butte, the said defendants entered into a contract with said plaintiff whereby defendants agreed

to buy and plaintiff agreed to sell all of his Thompson seedless grapes, then on the vines of the property of plaintiff consisting of about $4\frac{1}{2}$ acres . . . amounting to about twenty-five tons, at fifteen dollars per ton, and it was further agreed that plaintiff was to deliver said grapes at the East Gridley Northern Electric Railway station, when said defendants furnished boxes therefor.

“That on or about the 4th day of September, 1912, and while said grapes, so purchased by said defendants were still on the vines, a heavy rain storm occurred, and as a direct result thereof, the said grapes were badly damaged and some of them were wholly destroyed; that after said storm plaintiff delivered about three tons of grapes to said defendants at the station above named in said contract, and said defendants accepted the same, but refused to accept the remainder of the grapes they had so purchased, or any part thereof.”

There is no dispute that defendants paid for the grapes that were accepted but the controversy is over those alleged to have been rejected.

Defendants, in their answer, admitted the contract as alleged in the complaint but averred that “by the further terms of said agreement plaintiff specifically agreed that said grapes should be at the time of delivery to said East Gridley Northern Electric Railway station, good merchantable grapes and fit and suitable for table use.” Defendants also repeated the allegations as to the storm and alleged “that said rain storm did render the grapes unfit and unsuitable for table use and not merchantable, and consequently they were not in a suitable condition to comply with the terms of the contract of sale.”

The court found that the contract was as claimed by defendants, and that as a result of the said rain storm “the grapes which had not been picked were badly damaged, and some of them were wholly destroyed, and they were rendered unfit and unsuitable for table use, and the said grapes were not sound and merchantable at the place of production contemplated by the parties to the contract.”

There can be no doubt that the evidence supports these findings and they, in turn, support the judgment for defendants. As to the quality of the grapes, indeed, the pleadings scarcely leave anything to be supplied since plaintiff with

refreshing candor avers that said grapes were "badly damaged and some of them entirely destroyed." If they were "badly damaged" it could hardly be said that they were sound and merchantable or fit for table use. Defendants, however, did not rest upon the admissions of the complaint but called witnesses whose testimony to the point is sufficient to meet the requirement of the rule.

Mr. Dalton, who was working for plaintiff, testified that he was engaged, after said storm, in hauling the grapes to the railway station and that "they were mouldy" and that he did not "consider them good merchantable grapes." Other disinterested witnesses also testified to the same effect. Defendant, Porter, testified that "some of them were good grapes, as I told them, when they went to pick, I told them not to put anything in but good grapes; and I told Mr. King and Mrs. King, 'You have packed grapes for Gallagher and Harris and you know what they will take and what they won't take,' and I said, 'Don't put anything in there but what you know they will take and it will be all right, I will take them.'" It seems he was buying for Gallagher and Harris to whom he was to ship them in Oakland. Porter went on further to say that no good merchantable grapes were delivered to defendants after said storm at said railroad station and that he paid for all the grapes that were delivered according to the contract.

It may be said also, without quoting further from the testimony, that Porter's explanation of his dealings with plaintiff and the assignors in reference to said grapes, leaves nothing to be desired on the score of justice and equity. We must accept his statements as true and accordingly hold that he acted within his legal rights in declining to accept the damaged grapes, unless, perchance, there was in the contract no warranty, either express or implied, of their quality.

But the court was legally justified in holding that the warranty was one of the express terms of the contract or that it should be inferred from the other terms and conditions. Mr. Porter, indeed, testified that—"They were to be grapes that was fit for table use; that was explicitly understood; . . . The agreement was that I was to give them fifteen dollars per ton for all good grapes delivered at the Northern Electric cars at what is called East Gridley. This contract was made

on the 25th day of August on Sunday. The way that was I had been down to Pfoh's two or three different times to see him about his grapes and made him an offer of twelve dollars and a half a ton and he wouldn't consider it and I told him I couldn't pay any more than that for the grapes unless they were grapes that were fit for table use. . . . I said: 'I will come and look at them, Mr. Pfoh, and if they are fit for table use I think I can give you more.' He knew what I was buying the grapes for and so did all the balance of them. I told them." Even the plaintiff would not deny that he warranted the grapes to be merchantable and fit for table use. He was questioned by counsel and he gave answers as follows: "Do you state positively that you did not warrant the grapes to be merchantable and fit for table use A. Well— Q. (Int.) Do you or do you not? A. From the way I looked at it is, the way Mr. Porter bought these grapes, he bought them on the looks of them."

But, regardless of any express agreement to that effect, under the authorities, a warranty is presumed from the nature of the transaction between the parties. In considering this branch of the subject, as well as any other, we must, of course, accept the facts as shown by the evidence favorable to respondents' position.

In principle the case is identical with *Blackwood v. Cutting Packing Co.*, 76 Cal. 212, [9 Am. St. Rep. 199, 18 Pac. 248], and *Walti v. Gaba*, 160 Cal. 324, [116 Pac. 963]. Here there was no sale but a mere agreement to sell. Indeed, it is so alleged in the complaint. At the time of the contract there was no delivery of the grapes nor payment of the price. The grapes were in fact not in a condition in which the buyer could be called upon to accept them. They were not ripe and therefore not ready for delivery. The amount of the grapes was unknown but was to be ascertained by weighing them at the time they were ready for delivery. In fine, there are present all the substantial elements of an executory contract that are found in the said *Blackwood* and *Walti* cases. In the former, it is said: "It seems well settled that the question as to whether the title was passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case." It

is further declared that, in the absence of anything showing a contrary intent, there are certain circumstances which have a controlling force. The court proceeds to enumerate those existing in that case. One of them was that, at the time of the contract, there was neither delivery of the goods nor payment of the price. The contract there provided that the fruit was bought "at three cents per pound f. o. b. (free on board cars at) Haywards." It was held that the delivery of the goods and the payment of the price were conditions concurrent. The same is true here. The court declared: "And if the condition of payment is not waived the title does not pass until the price is paid. *Peabody v. Maguire*, 79 Me. 572, [12 Atl. 630]; *Evansville R. R. Co. v. Erwin*, 84 Ind. 464; *Turner v. Moore*, 58 Vt. 456, [3 Atl. 467]; *Adams v. O'Connor*, 100 Mass. 515, [1 Am. Rep. 137]; *Hoffman v. Culver*, 7 Ill. App. 454."

Other circumstances are said to be more specific *criteria* of the question. Of these one was that the goods were not in a condition in which the buyer could be called upon to accept them as the seller was to give the necessary cultivation to the orchard, pick the fruit, pack it in suitable boxes, and deliver it to the carrier at Haywards. Benjamin on Sales, b. 2, c. 3, is quoted to the effect that "where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

There was, it is true, in the Blackwood case another circumstance that probably does not exist here,—namely, some uncertainty as to the identification of the goods. This arose from the fact that the contract of sale was for "not less than seventy-five tons and not exceeding two hundred tons per annum." It was therefore held that segregation and weighing were necessary to identify the goods. The agreement here related to the whole crop. In that respect it differs from the Blackwood case, but the other mentioned circumstances are decisive. It is to be observed also that in the Blackwood case it was held that it was not a sale although the written

contract between the parties recited that the Cutting Packing Company "*bought*" of M. C. Blackwood his crop of apricots" and Blackwood "*sold*" his crop of apricots to the Cutting Packing Company. In that respect the case was stronger for the asserted vendor than the one here.

The subject was thoroughly discussed in the *Walti* case, in which the supreme court adopted the opinion of the district court of appeal of the first district, prepared by the late Mr. Justice Hall. From the syllabus we get the following concise statement of the principal facts and of the main point decided by the court: "The plaintiffs, who were the owners of a band of sheep located near Kings City, entered into a written contract which stated that they 'have this day sold' to the defendants 'all of our spring wool clip of 1906 at eighteen cents per pound, also the fall wool clip of 1905 at fourteen cents per pound. The fall wool, which is stored . . . at San Francisco, the spring wool to be delivered at Kings City depot in consideration thereof we accepted a deposit of two hundred and fifty dollars part of payment of said sale, the balance to be paid on the delivery of wool.' At the time the contract was executed the spring wool was on the bodies of the sheep. Held, that the contract was not one of present sale, but constituted a mere agreement to sell and buy; that the contract was entire, and did not pass title to any of the wool to the purchasers, and that the latter were under no obligation to pay for any of the wool until the delivery to them of all of it." There is a reaffirmance of the doctrine of the *Blackwood* case and the court declares that "If the sheep had been destroyed by act of God before the spring wool had been sheared and the wool thus lost, it would hardly be contended by any one that the buyer would bear the loss of the wool, or could be compelled to pay for it. He would not bear such loss because the title to the wool had not vested in him, and by the terms of the contract was not intended to vest in him until it had been sheared and delivered at Kings City."

In what is known as the *Elgee Cotton Case*, 22 Wall. 180, [22 L. Ed. 863], the United States supreme court held that the following contract did not pass the title but must be construed as an executory contract of sale: "We have this 31st day of July, 1863, sold unto Mr. L. our crops of cotton, now

lying in the county aforesaid, numbering about 2100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams and to be paid for when weighed, Mr. L. agreeing to furnish at his cost the bagging, rope and twine necessary to bale the cotton unginmed, and we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars. The cotton will be received and shipped by the house of D. & Co., New Orleans, and from this date is at the risk of Mr. L. This cotton is said to have weighed an average of 500 lbs. when baled." After reciting the rules already stated herein that must be applied in ascertaining whether the contract constituted a sale, the court, through Mr. Justice Story, declared: "They are in most cases held to be conclusive tests. Though not supported by all the decisions, they certainly are generally accepted in England, and by most of the courts in this country. In our judgment, therefore, the contract of July 31, 1863, must be regarded as only an agreement to sell and not as effecting a transfer of the ownership. It left the property in Elgee where it was before."

We consider the cases cited by appellant not inconsistent with the foregoing, in view of their peculiar facts. For instance, it is clear that the distinguishing feature of *Bill v. Fuller*, 146 Cal. 50, [79 Pac. 592], is the fact that the vendee was responsible for the unmerchantable condition of the fruit. It is so declared in the opinion, as follows: "The fact that they had been allowed to remain so long on the trees and thus become unfit for the market was the fault of the defendant, and he should not be allowed to take advantage of that fault."

After the cause was submitted plaintiff gave notice of motion for leave to file an amended complaint "according to the evidence proved in said cause." It does not appear, except in the opinion of the trial court, what was the specific amendment desired, but it is at least clear from said opinion that the judge considered the proposed amendment irrelevant. He states that the proposition was "to set up a contract of absolute sale" but that "unfortunately for him there was nothing in the testimony that would warrant the court in allowing such an amendment." The trial judge was legally justified

in taking this view of the evidence, and having reached the conclusion from the testimony of the witnesses that there was no sale, of course, it followed that the motion to amend should be denied. At least, in the state of the record, it cannot be said that there was any abuse of discretion therein.

It seems also that a motion was made to reopen the case that plaintiff might offer additional evidence as to certain words that appeared on the checks received in evidence and also that defendant Porter had admitted that he bought said grapes from plaintiff and his assignors. There is nothing to show that this motion was supported by affidavit or other evidence that might justify appellant's omission to present the evidence before the cause was submitted. Besides, it is quite clear that the evidence, if received, would not have produced a different result, the trial judge saying: "The motion to set aside the submission and introduce further testimony in view of what has already been said would be useless and therefore is denied."

Another motion seems to have been made for the court to set aside the judgment for the reason that the judge, in his opinion, had referred to the complaint as verified when, as a matter of fact, it was unverified. But it is apparent that only the trial judge could determine whether that circumstance was a decisive factor in the determination of the cause. In denying the motion he necessarily decided that the mistake was of no consequence. We cannot say that he erred.

We have referred to these assignments of error, although we are not directed to the portion of the transcript containing the record concerning them. We have examined all the points, indeed, made by appellant, but we see no reason for disturbing the judgment of the lower court, and it is therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1167. Third Appellate District.—October 21, 1913.]

**ELMER E. NICHOLS, Respondent, v. J. O. DAVIS et al.
Appellants.**

ATTACHMENT—AFFIDAVIT—AMENDMENT BY ATTORNEY.—Under sections 538 and 558 of the Code of Civil Procedure, an amended affidavit in attachment proceedings, as well as the original affidavit, can be made for the plaintiff by his attorney.

ID.—AMENDMENT OF AFFIDAVIT—WHEN ALLOWABLE.—Under section 558 of the Code of Civil Procedure the attaching party may, by amendment, supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof.

ID.—ACTION AGAINST TWO DEFENDANTS—AMENDMENT OF AFFIDAVIT TO SHOW.—An affidavit on attachment in an action against two defendants, which recites that the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the "said defendant," may be amended under section 558 of the Code of Civil Procedure by changing "defendant" to "defendants," and adding thereafter the words "or of either of them."

ID.—AMENDMENT OF AFFIDAVIT—DESCRIPTION OF CONTRACTS.—A statement in the affidavit that the defendants are indebted to the plaintiff upon seven express contracts for the direct payment of money in this state, and that payment of the same has not been secured, may be amended so as to describe the contracts, which consist of seven promissory notes, by reference to the complaint, and adding "that the payment of the same and each of them and each part of them has not been secured," etc.

ID.—CONSTRUCTION OF AFFIDAVIT—SECURITY FOR NOTES.—The affidavit, as thus amended, is not subject to the criticism that from aught that appears from the affidavit the payment of some of the promissory notes has been secured. The affidavit plainly enough states that such contracts have not been secured, nor has either of them nor any part thereof been secured.

ID.—NEGATIVE PREGNANT—INTERPRETATION OF AFFIDAVIT.—The rule with regard to a negative pregnant, as also an affirmative pregnant, has reference more particularly to a pleading, which must not be ambiguous. An affidavit in an attachment is not strictly a pleading, but is more a matter of evidence, and is to be given a fair and reasonable construction in arriving at its meaning.

APPEAL from an order of the Superior Court of Alameda County refusing to dismiss attachments. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

J. E. Pemberton, Keyes & Martin, and J. O. Davis, for Appellants.

J. A. Elston, and George Clark, for Respondent.

CHIPMAN, P. J.—Defendants appeal from the order denying their motion to dismiss certain writs of attachment upon several grounds of which only the following are urged in defendants' opening brief: That the affidavits used at the hearing "show affirmatively that there was security in the shape of a lien on personal property"; that the affidavit originally filed was so defective as not to admit of amendment under section 558 of the Code of Civil Procedure as amended in 1909 (Stats. 1909, p. 253); that the amended affidavit is fatally uncertain.

1. Plaintiff is the assignee of certain promissory notes assigned to him by the payee, the First National Bank of Berkeley. The pleadings in the action are not in the record, but we infer from what elsewhere appears that the notes in question were signed by both defendants. In his affidavit, defendant, J. O. Davis, deposed that the "said notes are in equity the obligations of the said Keystone Construction Company, and that plaintiff and the said First National Bank of Berkeley at the time of the filing of suit on said notes had full notice of such facts"; that, at the time of the execution of said notes, the said company was engaged in the performance of certain contracts with the city and county of San Francisco, involving a large amount of money—stating the particulars—and that said company, at the request of said bank, assigned to it the said contracts as security for the promissory notes of said company and other of its debts, "which debts the notes sued upon herein are in equity a part." How this alleged equity arises is not shown.

Witness Naylor, vice-president of the bank, testified that the Keystone Construction Company "was never in any way connected with the transactions of the loaning of the money by

said bank to J. O. Davis"; that "it was never at any time intended by the parties to the said assignments (of the Keystone Company contracts) that the same should be deemed security for the payment of the promissory notes hereinbefore mentioned. That it was at all times understood between the said bank and the said company that the assignments should constitute merely authorities to collect such moneys as might be collected by the said bank from said city and county of San Francisco." Other statements are made by the deponent further explaining the relation of the parties, all of which controvert the claim made by defendants that these Keystone Construction Company assignments were intended as security for the notes in suit.

2. It is contended that the affidavit filed on the issuing of the writs was "a worthless affidavit, one which was in legal effect only blank paper," and would not, under section 558 of the Code of Civil Procedure, justify the filing of a new affidavit by another affiant in such a case as this." (Citing *O'Connell v. Walker*, 12 Cal. App. 694, [108 Pac. 668].) In that case, the objection arose out of the statement as to security which was in the alternative. The indebtedness sued upon accrued, and the action was commenced, as we understand the case, before the amendment of section 558 in 1909, and, besides, the question of the right to amend did not arise in the case.

The only cases we have found decided on appeal referring to the amendment of the statute are *Jensen v. Dorr*, 157 Cal. 437, 441, [108 Pac. 320], and *Fairbanks, Morse & Company v. Getchell*, 13 Cal. App. 458, [110 Pac. 331]. In the latter case the notary who executed the *jurat* resided in and was commissioned as a notary of Kern County. The affiant was in the city of Los Angeles, and the notary called him up over the telephone and took his statement and administered the oath while the affiant was in Los Angeles. The court, for reasons given, said: "Inasmuch, however, as the act of Kaye (the notary) in administering the oath was a nullity, and the purported affidavit void, it follows that there was nothing to amend. The authorized amendment of the affiant contemplates the existence of an affidavit. There could be no irregularity in that which had no existence." Upon the point that in the present case the amended affidavit was improperly made by the plaintiff's attorney, the case cited shows that an affidavit may be made by

or on behalf of the plaintiff. (Code Civ. Proc., sec. 538.) We see no reason why an amended affidavit also may not be made on behalf of the plaintiff. Said section 558 reads as follows: "If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged; provided, that such attachment shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter." In construing this section in the case cited, Mr. Justice Shaw, speaking for the court, said: "Under this proviso the attaching party may by amendment supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof." In that case, there was in effect no affidavit at all, hence there was nothing to amend, and the statute gives authority only to amend what was in existence. That was as far as the case called for decision. We can conceive of an affidavit not absolutely void yet lacking in some substantive particular, but showing an honest attempt to follow the statute. It is not always easy to distinguish between matter of form merely and substance in dealing with statutory remedies and with statements required in affidavits. We should hesitate to differ from our learned brother and it may be that his construction of the statute is a safe and sound one. In the case in hand, however, such construction may be accepted and the order appealed from, in our opinion, upheld.

The original affidavit read: "That said attachment is not sought, and the said action is not prosecuted to hinder, delay or defraud any creditor or creditors of the said defendant." In its amended form it reads the same down to the word "defendant" which is put in the plural, "defendants," and the words, "or of either of them," added. This, we think, was allowable. The first affidavit read: "Elmer E. Nichols being duly sworn says: that he is the plaintiff in the above-entitled action; that said defendants in the said action are indebted to him in the sum of ten thousand (\$10,000) dollars

gold coin of the United States over and above all legal set-offs and counterclaims upon seven express contracts for the direct payment of money" with interest at seven per cent, and payable in this state and that payment of the same has not been secured, etc. In the amended affidavit these several seven promissory notes are described, and it is stated: "For a more particular description reference is made to the verified complaint on file herein, which is referred to and made part of this affidavit"; and, "that such contracts were made and are payable in this state and that the payment of the same and each of them and each part of them has not been secured," etc.; that "the plaintiff is absent from Alameda County, California (where the action was being tried), and will not return for four days. Affiant makes this affidavit for and at the direction of plaintiff, and affiant is familiar with the facts." This amended affidavit extends and elaborates and particularizes what was attempted, but was perhaps imperfectly stated in the original affidavit. There was not in that affidavit an entire "absence of that which constitutes the substance of the act required as a prerequisite to the issuance" of the writ.

3. We do not think the criticism is well founded that "from aught that appeared from the affidavit the payment of some of the promissory notes had been secured." It is urged that the phraseology with reference to the security is the "negative pregnant found anywhere in the books." Among the facts to be stated in the affidavit the statute reads: "and that such contract was made payable in this state and that payment of the same has not been secured by any mortgage," etc. The language used in the affidavit is—"that payment of the same (the contracts just previously mentioned), and of each of them, and of each part of them has not been secured," etc. Where there is a single contract or promissory note it would be sufficient to allege, in the language of the statute, "that the payment of the same has not been secured," etc., without adding "nor has any part thereof been secured."

It seems to us that where several contracts are the subject of the action it would be a sufficient compliance with the statute to allege "that such contracts were payable in this state, and that the payment of the same has not been secured by any mortgage," etc. Here the affiant has gone further and alleged "that each of them and each part of them has not been se-

cured," etc. The rule with regard to a negative pregnant as also an affirmative pregnant has reference more particularly to a pleading which must not be ambiguous. An affidavit in an attachment is not strictly a pleading, but is more a matter of evidence and is to be given a fair and reasonable construction in arriving at its meaning. So construed, the affidavit plainly enough states that said contracts have not been secured, nor has either of them, nor has any part thereof been secured. There is in fact no implication or admission that one or more of the contracts is not secured.

In our opinion, the original affidavit was not a nullity; that it was capable of amendment and as amended it was sufficient to justify the writ.

The order is affirmed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 215. Third Appellate District.—October 21, 1913.]

THE PEOPLE, Respondent, v. H. E. HARTMAN, Appellant.

CRIMINAL LAW — APPEAL — NONAPPEALABLE ORDERS.—No appeal lies from a motion in arrest of judgment, or from the verdict, or from an order suspending judgment and placing the defendant on probation.

Id.—ORDER DENYING NEW TRIAL—WHETHER APPEALABLE.—The word "order," in section 1247 of the Penal Code providing for the making of the record upon appeal from "any judgment or order" in a criminal proceeding, is not restricted to an order made after judgment, but the language of the section is broad enough to include an order refusing the defendant a new trial before judgment, notwithstanding the provisions of section 1239 allowing an appeal from "any order made after judgment," especially in view of section 1237 expressly giving the right of appeal from an order denying a motion for a new trial.

DIVORCE—DECREE FOR ALIMONY—SUPPORT OF CHILD.—Where it is ordered, in an action by a wife for a divorce, "that the entire care, custody and control of Dorothy M. Hartman, the minor child of said parties to this action, be and the same is hereby awarded to the plaintiff together with the sum of twenty dollars per month for her support and maintenance," the decree is not to be construed as requiring the husband to contribute to the support of the child.

CRIMINAL LAW—FAILURE OF PARENT TO SUPPORT CHILD—EFFECT OF DIVORCE.—Where the custody of a minor child has been awarded to the wife in an action for divorce, and the decree does not require the husband to contribute to its support, he is not liable to a criminal prosecution under section 270 of the Penal Code for omitting to provide the child with necessaries, in the absence of proceedings under sections 138 and 139 of the Civil Code to require him to contribute to the child's support.

APPEAL from an order of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

Preston & Preston, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted by a jury upon an information charging a violation of section 270 of the Penal Code, the charging portions of said information being as follows:

“The said defendant on or about the 1st day of January, A. D. 1912, at the said Mendocino County, state of California, and before the filing of this information did then and there, and ever since said date, willfully, unlawfully and feloniously omit without lawful or any excuse to furnish necessary food, clothing, shelter or medical attendance for his child named Dorothy Maxine Hartman; the said child being then and there under five years of age and dependent on said defendant for food, clothing, shelter and medical attendance, contrary to the form,” etc. Dated September 18, 1912. The verdict was as follows: “We the jury find the defendant guilty as charged in the information, but with a strong recommendation that he be placed on probation so long as he pays the amount agreed on with his wife.” At the time appointed for judgment, defendant interposed a motion for a new trial on the statutory grounds and also a motion in arrest of judgment on several grounds among which were—That the information does not state facts sufficient to constitute a public offense; that it fails to state that the minor child is in a dependent and destitute condition; or that defendant is under legal liability to support

said child; or that the offense charged, if any, was committed in Mendocino County. The record proceeds: "The court denied the same, and thereupon pronounced its judgment that whereas you, the said H. E. Hartman, having been duly convicted in this court of the crime of felony, to wit, failure to support your minor child, it is therefore ordered, adjudged and decreed that you, the said H. E. Hartman, having been duly convicted in this court of the crime of felony, to wit, failure to support your minor child, and that you be placed on probation, and it is further ordered that you pay \$10 per month on the 15th of every month beginning April 15th, 1913, for this period of two years, for the support of said minor child. It is also further ordered that you pay said amount on the 15th day of every month to the probation officer, under whose charge you are placed till the 15th of March two years hence. Pronouncement of judgment is hereby suspended. The defendant then gave notice that he hereby appeals to the district court of appeals . . . from the order denying the defendant's motion in arrest of judgment, also from the order denying his motion for a new trial, and also from the order suspending judgment and placing this defendant on probation, and from the whole and every part of each of said orders."

No appeal lies from a motion in arrest of judgment or from the verdict. (*People v. Lonnen*, 139 Cal. 634, [73 Pac. 586].) Nor is there an appeal, so far as we are advised, from the order suspending judgment and placing defendant on probation.

The attorney-general makes the point that "while the Penal Code has not repealed the section which states that in a criminal case a defendant may appeal from an order denying a motion for new trial"—section 1237 specifically provides that an appeal may be taken by a defendant from an order denying a motion for a new trial—"the statute has utterly failed to provide machinery for taking an appeal" from such order. . . . "Up to this time neither the supreme court nor the district court of appeal has made or formulated any rule providing how a defendant shall take an appeal from an order denying a motion for new trial in a criminal case." It is pointed out that prior to the amendment of section 1240 of the Penal Code (Stats. 1909, p. 1086) the appeal from such order was taken under that section. But, as it has read since 1909, it applies

only to appeals by the people. Attention is called to section 1239 which provides how an appeal may be taken "from a judgment" or from an "order made after judgment," which, it is claimed, cannot be used to perfect an appeal from an order made before judgment, such as is an order denying a motion for a new trial. Finally, it is contended that, while section 1247 of the Penal Code treats of making up of the record on appeal, the word "order" used in the section has reference only to "an order made after judgment" as provided in section 1239. Section 1247 reads: "Upon any appeal being taken from any judgment or order of the superior court to the supreme court or district court of appeal, in any criminal proceeding, where such appeal is allowed by law"—and then follow directions for making up the record. (Stats. 1911, p. 692.) Section 1241 of the Penal Code provides as follows: "Any announcement of an appeal made in open court by either the defendant or the people, must be by the clerk immediately entered in the minutes of the court," whose failure to do so "shall in no way affect or invalidate the appeal." We have seen that the right of appeal from an order denying a motion for a new trial is expressly given by section 1237; that "any announcement of appeal made in open court by either the defendant or the people" must be at once entered in the minutes (sec. 1241) and that "upon any appeal being taken from any judgment or order . . . in any criminal proceeding, where such appeal is allowed by law," the defendant may make an application, under section 1247, for the transcription of the reporter's notes, etc. By section 1247a, it is provided that after these notes have been filed with the clerk and corrections, if any, are made, and the judge has certified the transcription as correct, the clerk "must immediately transmit the same to the court to which the appeal was taken, and thereupon it shall become a part of the record upon appeal." In the present case, the trial court suspended the pronouncement of judgment, as it was authorized to do under section 1203 of the Penal Code, and placed the defendant upon probation. If there was, then, no judgment from which defendant could appeal the only course open by which to have the proceedings reviewed was by an appeal from the order denying his motion for a new trial. It is of this remedy which the attorney-general would deprive him. Under this

view of the law now urged upon us, there is no way by which a convicted defendant who has been placed upon probation can have his trial examined into on appeal unless judgment of conviction and sentence has been pronounced upon him by the court. We are unwilling to hold, as is contended, that the order referred to in section 1247 is an order made after judgment, thus leaving the defendant remediless by appeal. The statute reads: "Upon any appeal being taken from *any judgment or order* of the superior court," etc. This language is broad enough to include the order in question notwithstanding the provisions of the preceding section 1239 allowing an appeal from "any order made after judgment," especially in view of section 1237 expressly giving the right of appeal from an order denying a motion for a new trial.

The court instructed the jury "that the time covered by the information is from on or about January 1, 1912, up to the date of filing the information which is the 18th day of September, 1912."

It appeared that the defendant and Blanch Hartman were married December 15, 1907, ten days after the child in question was born. They separated less than a year thereafter. Blanch Hartman commenced her action for divorce on the ground of desertion, and summons was served on defendant September 23, 1910. The prayer of the complaint was for the custody and care of the child and ten dollars per month for plaintiff's support and maintenance. The defendant failed to answer, and, on his default, the interlocutory decree was entered, November 10, 1910, in which it was "ordered that the entire care, custody and control of Dorothy M. Hartman, the minor child of said parties to this action, be and the same is hereby awarded to the plaintiff, together with the sum of twenty (\$20.00) dollars per month for her support and maintenance, payable on the second Monday of each and every month hereafter commencing with the 14th day of November, 1910." The final decree was made and entered on November 24, 1911, in which the order as to the care and custody of the child and the support and maintenance of the wife is the same as in the interlocutory decree.

The natural as well as the grammatical construction of the language of the decree is that the award of twenty dollars per month was for the support and maintenance of the wife and

was in accordance with the prayer of the complaint except that it was for twenty dollars instead of ten dollars per month. If there is any doubt as to the construction to be given the decree the defendant is entitled to the benefit of such doubt. The defendant testified that he did not know until the action was brought that the decree contained any provision for support and there was no evidence that he was ever served with a copy or knew of its provisions further than generally that a decree of divorce had been granted to his wife. The evidence was that the child has been in the care and custody of Mrs. Hartman's parents the most of the time since its birth and during the entire period charged in the information. There is no evidence that the child failed to receive all "necessary food, clothing, shelter or medical attendance," or that it suffered for the want of any of the necessities of life. There was evidence that, some time before the divorce, defendant paid to the grandparents ten dollars per month for four months, but has not contributed anything toward its support since that time except ten dollars sent his wife about the time the divorce was granted. There was evidence tending to show that he was able at some of this time to have contributed toward its support and there was evidence that during much of the time he was sick and unable to earn any money—once having been operated on for appendicitis, and for some months confined to a hospital. The evidence, however, was sufficient to warrant the implied finding of the jury that, during the period from January 1, 1912, to September 18, 1912, defendant could have contributed to the child's support had he been so disposed. The question is—Was he under any legal obligation to do so?

The trial court gave the following instruction to the jury: "I charge you that in this case, if you find that in the decree of divorce the court ordered the defendant here to pay the sum of \$20 per month toward the care, custody, and education of the minor child named, then it became the duty of this defendant to pay such sum as required by the court, and the same became a legal charge against said defendant, and it was the duty of this defendant to pay the same, even though he was deprived of the custody of the child by the decree of divorce." The court also charged the jury: "that if you believe from the evidence in this case beyond a reasonable

doubt that said defendant was able during said period (January 1, 1912, to September 18, 1912), to contribute toward furnishing the necessary food, clothing, shelter or medical attendance for his said child, and that he willfully omitted to do so without lawful excuse, then it is your duty to find the defendant guilty as charged in the information, no matter what his condition has been since said time nor what it may be at the present time." The court instructed the jury further—"that it is the law of this state that a parent who willfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance for his minor children, is guilty of a crime, and may be prosecuted therefor in the name of the people of the state of California. I charge you, therefore, in this case that if the court in the decree of divorce ordered this defendant to pay the sum of \$20 per month or any other sum toward the support of this child it was his duty to do so and if he willfully omitted to do so without any lawful excuse therefor as charged in the information, then you should find the defendant guilty as charged in the information."

It will be observed that the court did not instruct the jury that the divorce decree placed any duty upon defendant to support his child but left the question of its interpretation with the jury. The decree was introduced and admitted for the purpose of showing that by its terms it imposed this duty upon defendant and the jury so construed it. We do not think it warranted such construction. The theory of the prosecution was that this decree placed upon defendant this duty, and he having failed to show any lawful excuse for its nonperformance, the verdict of guilty necessarily followed; and it is contended that the fact that the child was cared for willingly by its grandparents furnished no sufficient excuse for defendant's failure of duty put upon him by the decree of divorce.

In the *Matter of McMullin*, 164 Cal. 504, [129 Pac. 773], the decree of divorce, upon substituted service of defendant, was granted in the state of Nevada and awarded the care and custody of the children of the marriage to the plaintiff with provision for her and their support. She came into this state, and instituted guardianship proceedings upon the person and estate of her minor child, Juanita. Later, McMullin, defendant in the action for divorce, was held to answer in the

superior court by a magistrate for a violation of section 270 of the Penal Code, in failing to provide his minor child, Juanita, with necessary food, clothing, shelter, and medical attendance. It was held, on *habeas corpus*, that, while the decree of divorce must be given full credit in this state, the order for payment of money to support the child cannot be enforced against the petitioner; that, there being no enforceable decree for the support of the child, its custody having been given to the wife, section 196 of the Civil Code made it her duty to give the child "support and education suitable to his circumstances," there having been no "valid adjudication equivalent to an order made under a power similar to that granted by section 139 of our Civil Code, by which the husband is obligated to support his progeny while denied their custody." As we understand this decision, it is authority for holding that where, in a divorce proceeding, the custody of a minor child is given the mother and no provision in the decree is made for the support of such child by the father, the parent entitled to the custody of the child must support it. By supplementary proceedings, in a proper case, the court may, under sections 138 and 139 of the Civil Code, require the parent who has not the custody of the child to contribute to its support, but until some such proceeding is had his failure to so contribute to the child's support cannot be made the ground of a criminal proceeding under section 270 of the Penal Code. In the case cited the court said: "The legal effect, then, of both the Nevada decree and the guardianship decree was to give the mother the custody and control of the children, *without* charging upon the husband their support. Under section 196 of the Civil Code this situation *prima facie* relieves the husband of the duty of support and casts it on the wife." The principle would seem to apply as well to a domestic decree as to a foreign decree, the determining fact being, as here, that it devolved no duty on the father and did devolve it on the mother.

In the case of *People v. Schlott*, 162 Cal. 347, [122 Pac. 846], which was a prosecution under section 270 of the Penal Code, the duty of the divorced husband to provide for the child's support was held to have devolved upon him because the decree expressly required this of him, and therein constituted the distinguishing difference between that case and

Selfredge v. Paxton, 145 Cal. 713, [79 Pac. 425]. In reviewing the decision of the district court of appeal from the first district, in the Schlott case (opinion by the late Mr. Justice Hall, 12 Cal. App. Dec. 523), the supreme court does not express dissent from the reasoning of that decision when applied to a case where the divorce decree imposes no duty on the husband and father to contribute to the support of the child whose custody is given to the wife and mother. Judge Hall there took the view that, under our statutes and the decisions of the supreme court by him pointed out, the duty to furnish the child with food, etc., "is upon the parent entitled to its custody" (Civ. Code, sec. 196), and in *Ex parte McMullin* it was expressly held that "this situation *prima facie* relieves the husband of the duty of support and casts it upon the wife." This view of the law we must accept and enforce though not in accord with that expressed by us when the case was before us. (*In re McMullin*, 19 Cal. App. 481, [126 Pac. 368].) The instructions of the learned trial judge were based upon an erroneous view of the law and necessarily misled the jury to defendant's prejudice.

Defendant contends with some reason that where, as here, the child was willingly and, apparently, well and adequately cared for by its grandparents during the period charged, the omission by defendant to furnish necessities is not sufficient to make out a crime under section 270 of the Penal Code. The section declares the parent guilty of a felony "who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attendance for his child." There was evidence that defendant had offered to take the child and support it, but as he was not entitled to its custody this offer probably cannot avail him. The grandmother of the child testified that defendant had not been asked by the grandparents to contribute to the child's support during the period charged in the information, although, as has been stated, defendant agreed some years before to pay them \$10 per month for that purpose and paid this sum for four months but made no further payments. The complaining witness, Mrs. Hartman, testified that, in the latter part of 1911, she wrote defendant for money for the child's support then in the keeping of its grandparents, to which he replied that he would take the baby "and support her at his home and keep her until I

wanted her, but that was not the ruling of the court I was supposed to have her and I could not afford to pay for her board and have her with me. . . . Q. And from that time until this you have never made any demand on him for support? A. No. Q. And you think that was about November, 1911? A. Well, I couldn't swear to that. Q. Anyway it was last fall? A. Yes, sir, last fall. . . . Q. Then from the fall of 1911 to the time you started the suit (which was in September, 1912), you never even so much as asked him for support for the child any more did you? A. No, not that I can remember." She testified that there was an understanding between herself and husband before the divorce decree was entered that she would not call upon him for money until she needed it. They were talking about the divorce and she did not want him to oppose it and he insisted as a condition of not doing so that nothing should go in the decree about support. She refused to agree that no provision should be made for her support and insisted on the decree giving her ten dollars, because, as she said, she could not trust his word, but she agreed not to call on him for it unless she needed it. This agreement cannot be taken as affecting in any way the terms of the decree and it is significant only as tending to excuse defendant for omitting to support the child except when called upon to do so.

Defendant cites several cases which lend support to his contention.

A Missouri statute (Rev. Stats. 1909, sec. 4492) provides that if any father without lawful excuse fails to provide such infant with necessary food, etc., he shall be punished. Defendant and his wife separated, the wife going to her father's house taking with her one child of the marriage, and another was born at the house of the wife's father, and both children were there supplied with all necessary food, etc. Defendant, after the separation, contributed nothing to their support. It was held that "necessary" food, clothing and lodging, used in the statute, is food, etc., which the infant actually needed at the time; and that as the infant children were receiving necessary food, etc., defendant was not guilty. (*State v. Thornton*, 232 Mo. 298, [32 L. R. A. (N. S.) 841, 134 S. W. 519].) Said the court: "The legislature did not enact this law for the purpose of punishing the parents for failure to

do their duty as such. Such a purpose would smack too strongly of paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that if the infant children are receiving food, clothing and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise." Again: "The statute penalizes the refusal of the father to supply necessary food, etc. Under the law pertaining to necessities, a necessary article is one which the party actually needs. It is not enough to show that the article is *per se* classed as necessary, such as food and clothing. It must be actually needed at the time." Some other cases to like effect are cited.

We are urged to give a construction to section 270 of the Penal Code in harmony with these decisions. We are not prepared to accept unqualifiedly the doctrine of the case cited, and, as we think the case in *In re McMullin* is decisive of the question here, we express no opinion as to the scope and meaning of section 270.

The order is reversed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 20, 1913.

[Crim. No. 462. First Appellate District.—October 25, 1913.]

THE PEOPLE, Appellant, v. W. W. FRASER, Respondent.

CRIMINAL LAW—FILING FALSE BIRTH CERTIFICATE.—A birth certificate is not an "instrument" within the meaning of the term as used in section 115 of the Penal Code, which makes it a felony to procure the filing or recording of a false or forged instrument in any public office of the state.

Id.—RECORDING FALSE INSTRUMENT—MEANING OF "INSTRUMENT."—The word "instrument" as used in section 115 of the Penal Code, is lim-

ited in its meaning and application to that class of instruments invariably referred to throughout our statutes.

ID.—DEFINITION OF WORD "INSTRUMENT."—Generally the term "instrument" as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term "instrument" as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco sustaining a demurrer to an information. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, J. H. Riordan, Deputy Attorney-General, C. M. Fickert, District Attorney, and Louis Ferrari, Assistant District Attorney, for Appellant.

D. J. Hall, and C. A. O'Dell, for Respondent.

LENNON, P. J.—The defendant in this case was charged in an information filed in the city and county of San Francisco, with having violated section 115 of the Penal Code, which reads as follows: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state or of the United States, is guilty of a felony."

The instrument referred to in the charging part of the information was set out in full, and purports to be a duplicate certificate of birth signed by the defendant, wherein he, as the attending physician, certified that on September 10, 1910, he attended the birth of a male child in the city and county of San Francisco, named Charles Eugene Slingsby; that the name of the father of said child was Charles Henry Reynard Slingsby, and that the maiden name of the mother of said child was Dorothy Morgan Cutler.

The information further alleged that the defendant unlawfully, willfully, feloniously, and knowingly procured said cer-

tificate to be filed, registered, and recorded in the office of the state board of health, in which office said certificate, if genuine, might have been filed, registered, and recorded under the laws of the state of California.

It was specifically charged in the information that said certificate was false in the particulars that neither of the parties mentioned therein was respectively the father or mother of the said child; that the real father and mother of the said child were respectively one Peter Colvin and one Lillian Anderson, all of which, the information alleged, the defendant well knew at the time he procured said certificate to be filed, registered, and recorded.

The defendant's demurrer to the information was allowed by the court, and the people have appealed.

It appears from the record before us that the demurrer was allowed solely upon the ground that the information did not state facts sufficient to constitute a public offense. In our opinion the demurrer upon the ground stated was well taken and rightfully allowed.

A birth certificate is not an instrument within the meaning of the term as used in section 115 of the Penal Code. The context of that section does not indicate that the term "instrument" as employed therein was intended to mean anything different in form and effect from the "instrument" repeatedly referred to in numerous and various other sections of our code system. Nothing to the contrary appearing (either expressly or impliedly) from the language of the code section under discussion, it is inconceivable that the legislature intended that the word "instrument" as used in that section should have any different or broader meaning than that uniformly contemplated by every other code section wherein the word is to be found. It must therefore be presumed that the word "instrument" as used in section 115 of the Penal Code, is limited in its meaning and application to that class of instruments invariably referred to throughout our statutes. (*Hoag v. Howard*, 55 Cal. 564; *Miller v. Dunn*, 72 Cal. 462, [1 Am. St. Rep. 67, 14 Pac. 27].)

Generally the term "instrument" as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term

"instrument" as employed in our statutes has been defined to mean an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty. (*Hoag v. Howard*, 55 Cal. 564; *Foorman v. Wallace*, 75 Cal. 552, [17 Pac. 680].) This definition of the term as applied to writings contemplated, created, and controlled by various code provisions, has been repeatedly followed and applied in a variety of cases. Thus, for example, it has been held that a notice of *lis pendens* is not an instrument in the sense contemplated by our statutes (*Warnock v. Harlow*, 96 Cal. 298, [31 Am. St. Rep. 209 31 Pac. 166]); that a map is not an instrument within the meaning of the recording act (*Colton L. & W. Co. v. Swartz*, 99 Cal. 278, [33 Pac. 878]); that neither an attachment nor a judgment is an instrument within the meaning of section 1107 of the Civil Code (*Wolfe v. Langford*, 14 Cal. App. 359, [112 Pac. 203]), and that a notice of a claim of water-rights, although required to be recorded by section 1415 of the Civil Code, is not an instrument within the accepted definition of statutory instruments (*De Wolfskill v. Smith*, 5 Cal. App. 175, [89 Pac. 1001]).

An unbroken line of authorities from other jurisdictions uniformly concur in the definition of a statutory instrument adopted and accepted in this state. Particularly in point is the case of *State v. Kelsey*, 44 N. J. L., pp. 1 and 32. In that case the secretary of state sought to recover certain fees for filing in his office every certificate of birth, marriage, and death; and the court was called upon to construe a statute which gave to the secretary of state, among other fees, twelve cents for "filing every bond or other instrument of writing of a public nature." The court in effect held that the phrase "instrument of writing," in its intrinsic signification and standing alone, did not embrace every possible paper writing, but only paper writings of a particular class, which did not include certificates of birth. The conclusion arrived at in the case last cited was based upon substantially the same reasoning which is the foundation for the definition of "instrument" adopted by the courts of this state.

For the reasons stated we are forced to the conclusion that the birth certificate alleged to have been prepared and procured to be filed by the defendant in the present case contains

none of the essentials of a statutory instrument; and therefore the conduct charged against the defendant in the information, however reprehensible it may be from a moral and ethical point of view, is not punishable under the provisions of section 115 of the Penal Code.

The order appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 486. First Appellate District.—October 25, 1913.]

CITY AND COUNTY OF SAN FRANCISCO, Respondent,
v. CHARLES MAIN et al., Defendants; **FLORA B. MacDERMOTT**, Defendant and Appellant.

NAVIGABLE WATERS—TERMINATION OF NAVIGABILITY—SUIT TO QUIET TITLE.—In this action by the city and county of San Francisco to quiet title to land formerly lying in the bed of Mission Creek, and subsequently known as Channel Street, the evidence shows that Mission Creek ceased to be navigable prior to December 27, 1867, the date when the land now owned by the defendant passed from the ownership of San Francisco to the defendant's predecessor in interest, and hence that no right of way over the creek as a navigable stream ever passed to the defendant's predecessors.

ID.—NAVIGABILITY OF STREAM—HOW DETERMINED.—Whether or not a stream is navigable is a question of fact, at least in the absence of a legislative declaration as to its navigability, and is determinable by its practical utility for navigation during ordinary stages of water at any particular time.

EASEMENT—EXTINCTION THROUGH NONUSER AND ADVERSE POSSESSION.—While the mere nonuser of an easement acquired by grant for any period of time will not of itself operate to extinguish it, yet when such nonuser is coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the period prescribed by law, the easement will be extinguished by the statute of limitations.

ID.—PUBLIC STREET—CLOSING BY CITY—RIGHTS OF ABUTTING OWNER LOST BY LIMITATIONS.—Where a city formally and physically closes a street, constructs valuable improvements therein, and maintains adverse possession of the land to the exclusion of any right of easement therein by an adjacent property owner, his right to an easement is barred by limitations after the lapse of ten years.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Pringle & Pringle, and W. S. Andrews, for Appellant.

Percy V. Long, City Attorney, and Harry G. McKannay, Assistant City Attorney, for Respondent.

RICHARDS, J.—This is an action brought by the city and county of San Francisco to quiet title to a tract of land lying in what was formerly the bed of Mission Creek, between Tenth and Eleventh streets, and forming a part of the southern boundary of the lands of the appellant herein.

The defendant, Charles Main, permitted judgment to go against him by default; but the defendant, Flora B. MacDermott, appeared, and filed her answer and cross-complaint, wherein she averred that she was entitled to an easement over the lands in question based upon two distinct claims of right, the first being that Mission Creek was and continued to be a navigable stream until a time after the date when her predecessors acquired title to the lands she now owns from the plaintiff herein; and the other claim being that after Mission Creek ceased to be navigable it became, and for some years continued to be, a public street known as Channel Street; that while thus open as a public street the predecessors in interest of the appellant had the right of ingress and egress to and from the land she now owns along and upon it; and that the said street having been closed without her consent and without payment of the compensation which the constitution provides shall be prepaid when private property is taken for public use, she is still entitled to her right of way over said property.

The plaintiff's answer to the cross-complaint of said defendant consists of specific denials of its averments, and also of a plea of the statute of limitations.

In so far as the claim of the appellant to an existing right of way over the lands in question is based upon the fact that Mission Creek was once a navigable stream, we think it is fairly deducible from the evidence that Mission Creek had ceased to be a navigable stream prior to December 27, 1867,

the date when the lands now owned by the appellant first passed from the ownership of the city of San Francisco to James Dows, the original grantee thereof. Whether or not a stream is a navigable stream is a question of fact, at least in the absence of a legislative declaration as to its navigability, and is determinable by its practical utility for navigation during ordinary stages of water at any particular time. (*Cardwell v. County of Sacramento*, 79 Cal. 347, 349, [21 Pac. 763].) It appears from the transcript that Mission Creek was finally and effectually closed to navigation at least as early as 1864, when the railroad was built across it. This was while the city of San Francisco was still the owner of the land which the appellant now owns. It necessarily follows that no rights of way over Mission Creek as a navigable stream ever passed to the predecessors in interest of appellant.

As to the second contention of appellant, the record discloses the undisputed fact to be that on or about the sixteenth day of October, 1876, the city and county of San Francisco physically closed to public use that portion of Channel Street which occupied the bed of Mission Creek and bounded on the south the lands now owned by the appellant, and thereby obstructed and prevented all use of the same by the predecessors in interest of the appellant for ingress to and egress from the property now owned by her; and that by so doing whatever right or rights of way appellant or her predecessors in interest may have had in or over the lands in question were and ever since have been obstructed, interfered with and physically taken away.

It is conceded that this continued interference with appellant's right or rights of way was without her consent; but the fact also appears that for a period of more than ten years from and after the date of the closing of Channel Street, and obstruction and denial of appellant's right or rights of way therein, no legal or other action of any kind was ever taken by appellant in the way of insisting upon her rights in the premises. During all of this time the city and county of San Francisco put the property in question to uses entirely inconsistent with the recognition, existence, or exercise of appellant's right of way over the same. The respondent now contends that the claim which the appellant here asserts to an

existing right or rights of way over said property is barred by the statute of limitations.

In response to this contention the appellant insists that the act of the city and county of San Francisco in closing Channel Street, and thus destroying appellant's use of the same, amounted to the taking of her property for a public use; and that since the constitution of the state forbids the taking of private property for public use without compensation first being made for the property thus sought to be taken; and since no compensation has ever been offered or made in the manner provided by law for her right or rights of way thus obstructed and attempted to be destroyed, she still retains and may now assert the same under the protection of this constitutional guarantee. In support of this view appellant cites the case of *Bigelow v. Ballerino*, 111 Cal. 559, [44 Pac. 307]. An examination of that case, however, will show that no question of the application of the statute of limitations was presented by either the pleadings or proofs, and that the court was not called upon to decide the question presented in this case. The question here presented is whether, notwithstanding the constitutional right of an owner of private property to insist that his property shall not be taken or damaged for public use without compensation first having been made and paid therefor in the manner provided by law, he may not lose this right of property by permitting the period prescribed by the statute of limitations to run after and during the actual taking of the property and destruction of the easement by physical interference with its exercise, without any effort on his part to assert his right of property or object to its spoliation.

It would seem to be well settled law that while the mere nonuser of an easement acquired by grant for any period of time will not of itself operate to extinguish it, yet when such nonuser is coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the period prescribed by law, the easement will be extinguished by the bar of the statute of limitations. (Washburn on Easements, 4th ed., 717, 719; Jones on Easements, sec. 865-6; *Currier v. Howes*, 103 Cal. 431, [37 Pac. 521].) That this is the rule between the private owners of dominant and servient tenements there can be no question.

Does this rule apply in favor of a municipal corporation in cases like the one at bar?

The right of municipal corporations to close public streets in the method provided by general laws or by their charters, and by so doing to extinguish the public right of way over the lands thereof, is no longer open to question; and there are some authorities which go so far as to hold that when the statutory method for closing streets has been followed, the right of abutting property owners is also extinguished, except in cases where the easement is shown to be essential as a means of using and enjoying the abutting property. (Jones on Easements, sec. 542.) In view of the express requirement of our constitution, that private property shall not be taken or damaged for public use without compensation first being made, the rule in this state may not go so far,—and the facts of this case do not require it. The evidence herein clearly shows that in the year 1876 the municipal authorities not only formally, but actually and physically closed Channel Street, and have ever since maintained the adverse possession of the lands formerly occupied by such street to the exclusion of appellant and her predecessors in interest from the exercise of any right or easement therein; and that this exclusion and adverse possession on the part of respondent continued for at least ten years, during all of which time appellant took no action of any kind in the way of an assertion of her easement. During this period also the respondent erected public buildings and constructed valuable and permanent improvements upon the property, the destruction or removal of which would be required if the present tardy assertion of appellant's alleged easement were to be upheld. Under these circumstances the easement of appellant in and over said lands must be held to have been long since barred by the statute of limitations. This is the rule as between private owners of dominant and servient tenements. That it is also the rule as between the private owner of a dominant tenement claiming an easement in public property, with respect to which its owner, a municipal corporation, has done all of the acts, and claimed and exercised all of the rights essential to establish adverse possession against the assertion of the easement, during the statutory period required in order to support a plea of the statute of limitations, is amply supported by authority. (Dillon on

Municipal Corporations, 5th ed., secs. 978 (note), 1125, 1188, 1262 and cases cited.)

It follows that the judgment must be affirmed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1251. First Appellate District.—October 28, 1913.]

W. G. HOLLAND, Respondent, v. D. J. CANTY et al.,
Appellants.

APPEAL—SUFFICIENCY OF EVIDENCE—SPECIFICATION OF PARTICULARS.—

Where the statement of a case contains no specification nor attempted specification of the particulars in which it is claimed that the evidence is insufficient to justify the findings and decision, the appellate court cannot resort to it, either upon the appeal from the judgment or the order denying a new trial, for the purpose of determining the sufficiency of the evidence to support the findings.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. Geo. E. Church, Judge.

The facts are stated in the opinion of the court.

Royle A. Carter, E. A. Williams, and C. E. Beaumont, for Appellants.

Frank Kauke, and Geo. Cosgrave, for Respondent.

LENNON, P. J.—In this action to quiet title plaintiff was awarded judgment in keeping with the allegations and prayer of his complaint. The defendants have appealed from the judgment and from an order denying a new trial upon a statement of the case.

The alleged insufficiency of the evidence to justify the trial court's findings of fact is the only point made in support of the appeal.

The point cannot be considered. The statement of the case before us contains no specification nor attempted specification

of the particulars in which it is claimed that the evidence is insufficient to justify the findings and decision. This being so, the settled statement of the case could not be rightfully resorted to in the court below upon the hearing of the motion for a new trial in so far as the insufficiency of the evidence to support the findings is concerned; nor can this court resort to such statement either upon the appeal from the judgment or the order denying a new trial, for the purpose of determining the sufficiency of the evidence to support the findings. (*Winterburn v. Chambers*, 91 Cal. 170-185, [27 Pac. 658]; *Matter of Baker*, 153 Cal. 537, 542, [96 Pac. 12].)

The findings, assuming them to be correct—as we must—fully support the judgment.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Crim. No. 223. Third Appellate District.—October 28, 1913.]

THE PEOPLE, Respondent, v. J. KAWASAKI, Appellant.

CRIMINAL LAW—HOMICIDE—DEFENSE OF ALIBI—SUFFICIENCY OF EVIDENCE.—In this prosecution for homicide the evidence sustains the finding against the defendant on his claim of *alibi* and justifies the jury in concluding him to be the identical person who did the killing.

ID.—ALIBI—REFUSAL OF INSTRUCTIONS REGARDING.—The refusal to give an instruction requested by the defendant on the question of *alibi* is proper, when full and correct instructions have been given on the subject, and the one refused adds nothing to one which has been given at the defendant's request, and the court tells the jury over and over again that if they have a reasonable doubt of the defendant's guilt they must acquit him, and that the law deems it better that many guilty persons should escape rather than one innocent person be punished.

ID.—IDENTITY OF ACCUSED—INSTRUCTIONS CAUTIONING JURY.—An instruction to "view with care most earnestly the testimony of those who testify to defendant's identity," is open to the objection that it is argumentative in form and directs special attention to one particular feature of the testimony, thereby conveying the implication that the judge is distrustful of it.

ID.—EVIDENCE AS TO WHEREABOUTS OF ACCUSED AT TIME OF CRIME.—

If a witness testifies that he was at a theater with the defendant on the night of the homicide, it is proper to exclude questions as to when he heard of the crime, if counsel does not state that the purpose of the testimony is to show that the homicide was committed while the witness and the defendant were at the theater, and that they first learned of its commission on their return therefrom.

ID.—EXAMINATION OF WITNESS—COUNSEL TAKEN BY SURPRISE.—

Where counsel for the defendant is taken by surprise in questioning a witness, but does not take advantage of permission given by the court to examine the witness as to different statements made before the trial, and turns the witness over to the prosecution for cross-examination, and the prosecution, without objection, examines the witness as to such statements, counsel for the defendant cannot, on redirect examination, go into the matter, nor can he have the answers of the witness on cross-examination stricken out.

ID.—UNSATISFACTORY TESTIMONY—SURPRISE—RIGHT TO SHOW CONTRARY STATEMENTS ELSEWHERE.—

The mere failure of witnesses to give favorable testimony for the party producing them does not entitle him to prove that they have made contrary statements elsewhere.

ID.—REFUSAL OF NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PRESUMPTION ON APPEAL.—

Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised, where affidavits in the record are conflicting.

APPEAL from a judgment of the Superior Court of Sacramento County and from an order refusing a new trial. J. W. Hughes, Judge.

The facts are stated in the opinion of the court.

Arthur H. McCurdy, and C. F. Jones, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Defendant, having been convicted of murder in the first degree with life imprisonment as the penalty imposed, appealed from the judgment and the order denying his motion for a new trial.

On the thirtieth day of August, 1912, in the evening about half past seven or eight o'clock, a boy thirteen years of age, named Earl M. Cue, was playing at "shadow boxing" on

Fourth Street, between L and M. streets, of Sacramento City, in what is known as the Japanese quarter. While doing so he stepped backward and accidentally "bumped" into a Japanese who was passing and the latter grabbed the boy about the neck. Two older lads, the deceased, Henry Cordano, and Ernest Capra, who were sitting on a barrel a little distance away, came up and demanded of the Japanese that he release Earl. A fight then ensued between the two older boys and several Japanese who had come upon the scene. While this was in progress one of the Japanese stabbed Henry Cordano from behind, the knife entering near the base of the skull and severing the spinal cord, producing a wound from which death was inevitable. We need not dwell upon the incidents preceding the homicide as it is not disputed that the crime was murder in the first degree. It is, however, earnestly contended that the offense was not committed by the defendant and that therefore we have a case of mistaken identity.

The futility, however, of urging an appellate court to hold as a matter of law, that the jury was not justified in finding against defendant on his claim of *alibi* and in reaching the conclusion that he was the identical person who killed Cordano, must be apparent from the following recital of some of the evidence: Ernest Capra testified that he saw the defendant there that night. "He was there; he had the knife in his hand when he left Henry. He had his hand up towards his neck. He was just leaving him." He also testified that he watched defendant as he ran across the street with a knife in his hand; furthermore, that two or three hours afterward he saw the defendant again standing near the scene of the crime, and he recognized him. After the arrest the witness observed the defendant at the police station and identified him as the man he saw with the knife. To the question of the district attorney, "Now, Mr. Capra, are you positive that this defendant is the same man that you saw with a knife in his hand standing over the form of Henry Cordano when Cordano was stabbed?" he answered, "Yes, sir." If the foregoing constituted all the evidence as to identification it is clear that, under the familiar rule, we should not disturb the verdict of the jury as unsupported. But other witnesses added positive corroboration. One George W. Davenport testified that he saw the

defendant come "from the scene of the stabbing and go down the alley toward Third Street."

C. M. Hoffman was in an automobile at the time, near where deceased was killed, and in his testimony declared that his attention was attracted by "a bunch of Japanese crossing the street," and, "when they got on the other side of the street, I could see they were fighting, and I ran across there towards them. . . . I could see they were fighting, one Jap on one side of the boy, and one behind him. The one behind him was—it appeared to me at the time that he was hitting him with his hand, but when the boy dropped, and he started to run, why I saw him then going through the motions of putting up a knife. . . . Then he ran down the alley—right by me—six or eight feet of me, anyway." He testified further that he saw the running man plainly, and that he was positive that it was the defendant. Of course, it is needless for us to go any further with this branch of the case. Our responsibility as to the identity of the slayer is at an end when we have found in the record such ample support for the verdict of the jury.

There is no merit in appellant's contention that the court erred in refusing a certain proposed instruction on the question of *alibi*. It is apparent that full and correct instructions were given upon the subject. Indeed, the one refused added nothing to the following which was given at defendant's request: "An *alibi* means that the defendant, at the time of the homicide, was absent from the place where the crime was committed. If it be established in this case, that at the time of the homicide, the defendant was in another locality other than where the homicide was committed, then he is entitled to an acquittal; and, although the testimony introduced by defendant on this point should not clearly show that he was not there at the time of the homicide, but if it raises a reasonable doubt in your minds as to whether or not the defendant was then in another place, this is adequate under the law, and you should render a verdict of not guilty."

The court was clearly right in refusing to give an instruction containing the admonition "I instruct you, therefore, to view with care most earnestly the testimony of those who testify to defendant's identity." It was open to the two objections pointed out in *Healy v. People*, 177 Ill. 323, [52 N. E.

426]. It was argumentative in form, and it directed special attention to one particular feature of the testimony, thereby conveying the implication that the judge was distrustful of it.

Besides, if it may be assumed that the jury needed to be reminded of their duty to exercise the greatest care in weighing the evidence, we find sufficient exhortation to that effect in several of the instructions of the court. No intelligent juror could have failed to be impressed thereby with a sense of his deep responsibility in determining the guilt or innocence of the defendant. The jurors were expressly directed to "carefully weigh all the evidence," and they were told over and over again that if they had a reasonable doubt of the defendant's guilt they must find him not guilty. In the following instruction the court even cautioned the jury as to the danger of convicting an innocent person: "The policy of the law deems it better that many guilty persons should escape rather than that one innocent person should be convicted and punished, so that unless the jury, after a careful and thorough consideration of all the evidence in the case, can say and feel that every material allegation in the information is proved, beyond a reasonable doubt, the jury should find the defendant not guilty." In fact, appellant can find no ground whatever for justly criticising the action of the court in the matter of the instructions.

M. Shimada, a witness for defendant, was asked these questions: "When did you first hear of the difficulty in which the boy was cut that night?" "Had you heard anything about any cutting before you went to the theater?" The court sustained an objection of the district attorney that the questions called for immaterial and hearsay evidence. The witness had testified that he went to the Pantages theater with defendant and two companions on the evening of August 30, 1912, and was with him from 7:30 P. M. to 9:30 P. M. If true, this would establish a complete *alibi*. It is claimed by appellant that the said questions were asked for the purpose of showing "that the homicide was committed while they were at the theater, and that they first learned of its commission on their return as more definitely to fix the time." In the absence of any explanation on the part of defendant as to the limited purpose for which he sought the evidence, it is apparent that the ruling of the court was justifiable. To show their materiality

he should have stated that the purpose of the questions was to fix the particular time in the mind of the witness.

Moreover, it is quite manifest that the answers would have added nothing to the certainty or potency of the testimony of the witness. The evidence without conflict shows that the boy was killed in the evening of August 30. Besides, he had already fixed the date with reference to the night when the boy was killed as follows: "Q. Did you see him (the defendant) on the night that that boy was killed on 4th Street between L and M, August 30, 1912? Did you see Kawasaki that night? A. Yes; August 30th, I saw him in the morning and in the evening about half past seven he come to my cigar stand, and we went to the theater together." He also stated that the visit to the theater was Friday evening three or four days before defendant was arrested, and it appears from other testimony that this Friday was the fatal 30th of August. It is thus apparent that there was no uncertainty in the mind of the witness as to the synchronism of the two events, and his credibility would not have been affected by his reply to said questions.

One H. Kishi was examined as a witness for defendant. He testified that at the time of the homicide he was in a jewelry store near where the boy was killed and, in answer to the question, "Did you see any portion of the fight?" he said: "No, I never saw any portion of the fight." After several further questions and answers the following is shown by the record: "Q. You say you did not see any portion of that fight? A. No; I never saw it. Q. You understand what I am asking you, Mr. Kishi? A. Yes. Q. There is no doubt but what you understand me? Mr. Wachhorst: We object to that. The Court: Mr. Jones is evidently taken by surprise by the answer of the witness. You understand the question, do you, Mr. Kishi? A. Yes, sir. Mr. Jones: Q. Mr. Kishi, you were at my office, were you not? A. Yes, sir. Mr. Wachhorst: I object to that. There is no evidence of any surprise. Mr. Jones: I say I am taken by surprise. The Court: Objection overruled." The witness, however, without being asked anything further along that line, was turned over for cross-examination when he was permitted without objection to state that he had related to Mr. Jones the same story he had told on the witness stand, and nothing more. On redirect examination he

was asked: "And you told me that you did not say to me that you saw that fight, and that Kawasaki had nothing to do with it?" An objection was made, and, after argument, the court sustained the objection, stating: "I saw by the answer of the witness that you were taken by surprise, and I overruled the objection of the district attorney to the question which you asked him about being in your office; but you stopped there, and you did not go on and cross-examine him as to whether or not he at that time made statements to you different from what he has made here. You stopped and turned him over to the other side." Whereupon counsel for defendant moved "to strike out all the answers of this witness, in answer to the district attorney on cross-examination. He had no right to ask those questions unless I at first had gone into the matter." The motion was denied.

There was no error in either ruling. On direct examination appellant was accorded the privilege of questioning the witness as to what he had stated to counsel, but advantage was not taken of the opportunity. The rule is that "the direct examination must be completed before the cross-examination begins, unless the court otherwise direct." (Code Civ. Proc., sec. 2045.)

After having allowed the questions on cross-examination to be answered without objection, appellant's dissatisfaction with these answers could not, under the familiar rule, avail him anything.

Furthermore, the testimony of the witness was not unfavorable to defendant, but simply failed to come up to the latter's expectations. In *People v. Cook*, 148 Cal. 345, [83 Pac. 48], it is said, through Chief Justice Beatty: "This court has in a number of cases held, and I have no doubt correctly held, that the mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere." (See, also, *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 215, [93 Pac. 1049].)

Again, the question proposed by appellant was no more in effect than the inquiry made of the witness by the district attorney. The witness already having been interrogated fully as to what he had stated to counsel, it would seem that nothing could be accomplished by a repetition of the examination.

Indeed, the "surprise" of the appellant must have been made quite apparent to the jury by the testimony and manner of the witness, counsel's own declaration, and the statement of the court that he was "taken by surprise." If anything more were needed and appellant's theory be correct he should have offered to contradict the witness as to what he stated to counsel. This, however, was not attempted.

A motion for a new trial was made upon the ground of newly discovered evidence and denied by the court.

Waiving the question whether the affidavits used on said motion are sufficiently authenticated to entitle them to consideration, it is sufficient to say that they were fully answered by counter affidavits, and the court was amply warranted in resolving the conflict in favor of respondent. "Applications of this kind are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised. There are many affidavits in the record, some in direct conflict with others. The trial court was in a far better position than this court to pass upon the truth of the matters contained therein." (*People v. Rushing*, 130 Cal. 449, [80 Am. St. Rep. 141, 62 Pac. 742].)

Appellant's counsel seems fully persuaded that his client has been the unfortunate victim of racial prejudice, but we can find nothing in the record to support the contention. All of defendant's legal rights were carefully safeguarded, and there is ample evidence of his guilt. No error has been discovered, and nothing remains for us but to affirm the judgment and order denying the motion for a new trial, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 27, 1913.

[Civ. No. 1177. Third Appellate District.—October 28, 1913.]

PETALUMA ROCK COMPANY (a Corporation), Appellant, v. A. M. SMITH et al., Respondents.

MUNICIPAL CORPORATION—STREET ASSESSMENTS—OMISSION OF SIGNATURE OF SUPERINTENDENT OF STREETS.—The fact that the superintendent of streets does not sign an assessment for street improvements does not deprive the contractor of his right to a lien, if the assessment recites that the superintendent made it, and the warrant is signed by the superintendent and refers to the assessment and diagram as made by him, and the three documents are attached together and duly recorded.

APPEAL from a judgment of nonsuit of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

Lippitt & Lippitt, for Appellant.

Haskell & Cromwell, for Respondents.

CHIPMAN, P. J.—This is an action to enforce several separate liens for street work done, under the so-called Vrooman Act, in the city of Petaluma. The sections of the act brought under examination are found in the amendatory act of 1889. (Stats. 1889, p. 157.)

The sole question arose upon the testimony of E. S. Shaver, the superintendent of streets of said city. The record is as follows:

“ ‘I am superintendent of streets of the city of Petaluma, and was such on the 7th day of November, 1907.’ ”

“A document is shown to witness and he is asked if that is his signature appended thereto, and he answers that it is.

“Plaintiff thereupon offered in evidence a warrant, assessment, certificate, diagram, affidavit of demand and nonpayment, showing that said warrant, assessment, certificate and diagram were recorded on the 7th day of November, 1907, by E. S. Shaver, superintendent of streets of the city of Petaluma, in the matter of the assessment for the improvement of Walnut Street from the northerly line of Prospect Street to the southerly line of Galland Street, street assessment No. 83.

"Defendants objected to the introduction of this paper, for the reason that the assessment was not signed by the superintendent of streets and there was nothing to show that the same was an authentic or official document. The assessment is an official action and it must be authenticated by his signature as superintendent of streets in order to authorize the assessment."

"The witness thereupon testified: 'This paper is the original assessment, return, diagram and warrant in this case, and was recorded in my office on the day which it is marked recorded and while I was superintendent of streets of the city of Petaluma. It is the assessment, warrant and diagram under which the improvement of Walnut Street, involved in this case, was done.'"

The assessment is in due form and reads:

"ASSESSMENT.

"Pursuant to statute, I, E. S. Shaver, as superintendent of streets of the city of Petaluma, county of Sonoma, state of California, do hereby assess and apportion, as shown hereinafter and in the diagram attached hereto, upon certain lots," etc. Then follows:

"Diagram.

"Exhibiting Walnut Street . . . on which work has been done under my official contract as superintendent of streets," etc. Next follows:

"Warrant.

"By virtue hereof, I, E. S. Shaver, of the city of Petaluma, county of Sonoma, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize," etc.

"At the city of Petaluma this 8th day of October, A. D. 1907.

"E. S. Shaver,

"Superintendent of Streets of the City of Petaluma.

"Countersigned by

"H. P. Brainerd,

"President of the Board of Trustees of the City of Petaluma.

"Recorded this 8th day of October, A. D. 1907.

"E. S. Shaver,

"Superintendent of Streets."

These documents were identified by witness Shaver as
"No. 83,

"City of Petaluma.

"Recorded the 8th day of October, 1907, Vol. 1, page 472 to 477.

"Delivered this 8th day of Oct., 1907.

"Returned this 7th day of November, 1907."

There was some evidence upon other matters which we understand are not now in question. Upon objection of counsel for defendants to the introduction of these papers in evidence, the court reserved its ruling and, upon motion for a nonsuit, sustained the objection and granted the motion "on the ground that the assessment was defective and omitted the signature of the street superintendent and was, therefore, irregular, illegal as an assessment and rendered the whole proceeding void." Judgment passed for defendants from which plaintiff appeals. The contractor's return was duly recorded and the record signed by the superintendent on November 7, 1907.

Section 8 of the statute of 1889 provides: "After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent . . . the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract" (then follow directions as to what facts shall appear in the assessment), "and shall attach thereto a diagram exhibiting each street crossing," etc. Section 9 provides: "To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

"FORM OF WARRANT.

"By virtue hereof, I (name of superintendent of, etc.) by virtue of the authority vested in me as said superintendent of streets do authorize and empower (name of contractor) (his or their) agents or assigns to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same.

"Date—Name of superintendent of streets.

"Countersigned by (name of mayor).

"Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording, of any warrant, assessment, diagram, and certificate, all persons mentioned in section eleven of this act shall be deemed to have notice of the contents of the record thereof." After these documents "are recorded the same shall be delivered to the contractor or his agent or assigns on demand . . . and by virtue of said warrant said contractor . . . shall be authorized to demand and receive the amount of the several assessments," etc.

Section 12 provides that when suit is brought to enforce the lien, "the said warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment shall be *prima facie* evidence of the regularity of and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based, and like evidence of the right of the plaintiff to recover in the action."

Respondents rely upon the case of *Dougherty v. Hitchcock*, 35 Cal. 512, which was decided in 1868 under the act of 1862 (Stats. 1862, p. 391); and upon *Himmelman v. Danos*, 35 Cal. 441.

In the particulars here involved the statutes of 1862 (Stats. 1862, p. 391) and of 1863 (Stats. 1863, p. 525) do not differ materially from the act of 1889. The provisions relating to the assessment, the diagram, and warrant; the recording of the same; the provision that the lien attaches upon the recordation; that thereafter they are made *prima facie* evidence of the regularity and correctness of the assessment and acts of the superintendent and of the right of the plaintiff to recover in the action, are the same in all these acts. The earlier statutes did not nor does the act of 1889 in terms require the superintendent to sign the several papers constituting the record except the warrant. In *Himmelman v. Danos* these documents were recorded in a book kept by the superintendent for the purpose indicated and under the copy appeared the words "Recorded this 9th day of October, A. D. 1866." This

certificate was not signed by the superintendent nor by any one for him. In the present case the superintendent did sign the certificate of the record. It was held that the copy of the record failing to show that it was authenticated could not be considered as a record. Its insufficiency was also pointed out in other respects. "But," said the court, "independent of the foregoing considerations, we think the copies found in the book cannot be received as a 'record,' for the reason that they were not signed by the proper officer. If it is true that it is not, in terms, provided that the record of the assessment, diagram and warrant, which, according to the plan of the statute, preceded by several days the record of the return or affidavit of demand and nonpayment, shall be separately signed by the superintendent, but it is, in terms, provided that the record, when completed by the addition of the contract and the return, shall be signed by that officer. But if there was no express provision to that effect, the official signature of the superintendent would be none the less material." What follows seems to be an argument to show that the record when made up should be authenticated, that is, signed by the superintendent; that though not essential to the validity of the record, these papers "should be recorded in the order of their coming. Like the summons, complaint, and answer in a judgment-roll, they constitute different parts of the same record; and as in the case of the former, each separate part should bear the date of its making, and the whole, when completed, should bear the official signature of the proper officer. The question, whether the record of the assessment should be separately signed, is reserved." We do not discover in this case that the precise question was decided. The court did not have occasion to comment on the lack of the superintendent's signature to the assessment. The point emphasized was that the record was not authenticated. But in *Dougherty v. Hitchcock*, 35 Cal. 512, the question was distinctly passed upon. It was there claimed by respondent, as is here claimed by appellant, that the assessment, diagram, and warrant were attached together; that the assessment referred to the diagram which latter was without fault, and the warrant referred to the assessment and diagram and was duly signed and countersigned; that the three papers constituted together one document, and the signature of one was the signature of all;

that the statute requires only that the warrant shall be signed and the specification of that one is the exclusion of the others from the requirement. The plaintiff here supplements these points by the further fact that the statute expressly makes the record of these documents the sole source of the lien and that the assessment as a separate official act derives its force from its recordation. In certain respects, hereinafter pointed out, the assessment in the present case contains certain statements not found in *Dougherty v. Hitchcock*. The opinion is by Mr. Justice Rhodes. Judge Sprague concurred specially upon the last point discussed which related to a question entirely apart from the one here. Likewise, Chief Justice Sawyer concurred specially on other grounds, stating: "I am compelled to dissent as to the other points discussed in the opinion of my associates." Neither of these judges expressed any opinion in the *Himmelman* case. Speaking of the assessment, Judge Rhodes said: "This is an official act on the part of the superintendent, and its character and authenticity can be attested in only one manner, and that is the official signature of the superintendent. Its official character must be made to appear on its face."

Reference is made to *Himmelman v. Danos* where it was held that the record was inadmissible because not signed. But, as was already shown, the record in the present case was signed and it was not decided in the *Himmelman* case that such a record as we have here would not be admissible. Judge Rhodes, in his opinion, proceeds: "But it is contended that it (the assessment) was helped out by the warrant, which was signed by the superintendent, and countersigned by the auditor, and was attached to the document. This position might be maintained if the two papers constituted only one official document, but they are distinct, and each must be in truth what it purports to be before they can be attached together for the purposes specified in the act. The position contended for would make a summons without the signature of the clerk valid, if it was attached to the other papers constituting the judgment-roll."

Answering the point that the statute requires only that the warrant shall be signed, the opinion continues: "There would be great merit in the argument if either of these documents could be regarded as official in the absence of an official signa-

ture," and the reasoning is that the requirement as to the warrant was unnecessary "for the issuing of the warrant as necessarily imports and includes its signature as the averment that a summons was issued by the clerk imports that it received his official signature."

There can be no doubt of the meaning of this decision—namely: that an assessment is invalid unless it shows on its face that the superintendent made it. There can be, however, some doubt as to whether the case demanded the decision. The document read:

"ASSESSMENT.

"Assessment for grading Clay Street, from Jones to Leavenworth Street, as per contract made with M. W. Griffin on the third day of July, 1863." Then follows a statement of work and its cost, rate of assessment, description of lots and names of owners, and nothing more. The warrant is a declaration by the superintendent—"by virtue of the authority vested in me as superintendent, do authorize and empower M. W. Griffin, his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached." There is nothing on the face of the assessment to show who made it and there is nothing in the warrant to show that the assessment was made by the superintendent. The diagram was omitted from the statement of facts and we do not know what it contained.

In the present case the assessment does show that it was made by the superintendent unless we must wholly disregard what it declares—namely: "Pursuant to statute, I, E. S. Shaver, as superintendent of streets . . . do hereby assess and appraise as shown hereinafter and in the diagram attached hereto." The warrant refers to the assessment and diagram as made by the superintendent and as attached thereto. No such relationship of the three documents appeared in the cases cited. In the Himmelman case the only papers before the court were what purported to be copies of a record which latter was not authenticated in any way. In the Dougherty case the assessment failed to show either by signature or by anything on its face indicating by whom it was made, and the absence of such evidence or any evidence of its authenticity, it seems to us, presents a different question from the one here. We have in this case a group of documents which, attached

together and duly recorded, becomes the basis of the liens. The statute requires that but one of these three papers (the warrant) shall be signed by the superintendent. It is quite true that the superintendent cannot make up a record having validity from papers which do not in some way show their authenticity, i. e., that they were his work or that of some one authorized to do it. But here not only the face of the assessment so shows but the superintendent testified, apparently without objection, that he made the assessment offered in evidence; that the papers offered in evidence were the original assessment, return, diagram, and warrant, which were recorded in his office and under which the improvement of Walnut Street was done. In *Williams v. McDonald*, 58 Cal. 527, in the resolution of intention the signature was printed, whereas the act required that it should be "signed by the clerk." He testified that he used a printed form and the court held that there was no objection to his adopting the printed signature. In *Auzerais v. Naglee*, 74 Cal. 60, 69 [15 Pac. 371], the court, in speaking of the acknowledgment necessary to take a contract out of the operation of section 360 of the Code of Civil Procedure, said: "The statute does not require the party to *subscribe* his name, and it is sufficient if it be evident from any part of the instrument of acknowledgment that the debtor named in it has given his assent, and as was said in *Rowe v. Thompson*, 15 Abb. Pr. (N. Y.) 377, 'as the legal definition of the word "signed" is the act whereby a person gives or declares assent by name, sign, or mark, it follows that it is enough if it appears in the body or upon the margin, or elsewhere of the instrument, that such assent has been given. If the attestation appears anywhere upon the face of the writing, it is sufficient, and the party thus attesting is bound as effectually as if he had subscribed his name at the foot.'"

In a holographic will the following was held sufficient without being subscribed by the testator: "I, George W. Johnson, do make," etc. (*In re Johnson Estate*, Myrick Prob. (Cal.) 5.)

The statute requires that the summons issued in an action shall be signed by the clerk. In *Ligare v. California S. R. R. Co.*, 76 Cal. 610, [18 Pac. 677], it was held that the printed name of the clerk was sufficient where the seal was affixed.

The lithographic signature of the secretary of an irrigation district was held sufficient, when adopted by him, in *Hewel v. Hogin*, 3 Cal. App. 248, [84 Pac. 1002]. (*Pennington v. Baehr*, 48 Cal. 565.)

Respondents cite *Ede v. Cunio*, 126 Cal. 167, 171, [58 Pac. 538], where the court, speaking of the assessment, diagram, and warrant, said: "Each of those documents essential to the creation of a lien is separate and distinct, and is to be complete in itself." This is undoubtedly true, but the question remains—When, i. e., in what condition must the assessment be to entitle it to be treated as "complete"? Here the only objection made was that it was not signed by the superintendent. We think it sufficiently appears on the face of it that it was his official act. He treated it as such, attached it to the other documents and recorded it and certified to the record.

Under the more liberal rules in recent cases given to the requirements of the statute we think we are authorized in holding that the objection now made is not such as to deprive the contractor of the lien to which it would otherwise be entitled. (*O'Dea v. Mitchell*, 144 Cal. 374, [77 Pac. 1020]; *Haughwout v. Raymond*, 148 Cal. 311, [83 Pac. 53]; *Burns v. Casey*, 13 Cal. App. 154, [109 Pac. 94].)

The judgment is reversed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 230. Third Appellate District.—October 28, 1913.]

THE PEOPLE, Respondent, v. ANDREW STEIN,
Appellant

CRIMINAL LAW—PRELIMINARY EXAMINATION—RIGHT TO COUNSEL.—It is unnecessary for the magistrate at a preliminary examination to go through the formality of advising the accused of his right to counsel, when he has already employed an attorney who is present when the case is called.

LD.—READING OF COMPLAINT TO ACCUSED—WHETHER MAY BE OMITTED.—An information will not be set aside because the complaint was not

read to the accused at the preliminary examination, where his attorney, who was present with him, waived the reading and announced a readiness to proceed with the examination.

ID.—INFORMING ACCUSED OF CHARGE AGAINST HIM—WHETHER COMPLAINT MUST BE ACTUALLY READ.—The statute does not in terms declare that the complaint shall be read to the accused at the preliminary examination, but that the magistrate must inform him of the charge.

ID.—HOMICIDE—SHOOTING INTO CROWD—MALICE IMPLIED.—Where one deliberately and unnecessarily shoots into a crowd of people, with an utter disregard of consequences, whereby human life is destroyed, malice is implied and the crime is murder, although he has no malice against any particular person in the crowd.

ID.—PARTIAL INSANITY—RESPONSIBILITY OF ACCUSED—INSTRUCTIONS.—It is not error to instruct the jury in a homicide case that, although the defendant, at the time he committed the act, was laboring under partial insanity, "if he still understood the nature and character of his act and its consequences, and had a knowledge that it was wrong and criminal, and he had mental power at the time sufficient to apply that knowledge, and to know if he committed the act he would be doing wrong, and receive punishment, and that he possessed a will sufficient to restrain the impulse he may have had to kill, arising from his diseased mind, then such partial insanity will not exempt him from responsibility, under the law, for such act, and you should find him guilty, in the degree shown by the evidence," provided the jury were convinced by the evidence beyond a reasonable doubt that the killing of the deceased by the defendant was without legal justification or legal excuse.

ID.—VOLUNTARY INTOXICATION—RESPONSIBILITY OF ACCUSED—INSTRUCTIONS.—Where the defense in a homicide case is insanity, partly superinduced by intoxicating liquors, and the prosecution claims that the accused was not insane but merely in a state of voluntary intoxication at the time of the offense, and considerable testimony is addressed to this feature of the case, it is proper to instruct the jury that "no act committed by a person in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but that where the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, evidence of the intoxicated condition of the accused at the time of the committing the act is admissible and may be considered by the jury in determining the purpose, motive or intent with which he committed such act."

ID.—DEFENSE OF INSANITY—INSTRUCTION CAUTIONING JURY.—An instruction in which the court cautions the jury to examine with care the defense of insanity interposed by the defendant "lest an ingenious counterfeit of the malady furnish protection to the guilty," while open to criticism, is not ground for reversal.

ID.—INSTRUCTIONS—GENERAL OBJECTION—REVIEW ON APPEAL.—Where error is claimed in rulings of the trial court on instructions, it is the duty of the party complaining on appeal to point out the error, otherwise it will not be reviewed, as it is not incumbent on a reviewing court to search through the record for the purpose of discovering for itself wherein the action of the trial court in the respect complained of involves error prejudicial to the defendant.

ID.—ARGUMENT OF DISTRICT ATTORNEY—WHETHER OBJECTIONABLE.—Where the evidence in a homicide case shows that the defendant, while intoxicated, deliberately and without provocation, shot into a crowd, the district attorney is justified in stating in his argument to the jury that if there ever was a case in his experience wherein there was disclosed an "abandoned and malignant heart," it is the case of this defendant.

ID.—MISCONDUCT IN ARGUMENT—OBJECTION—REVIEW ON APPEAL.—Objectionable remarks by the district attorney in a criminal case will not be reviewed or considered on appeal, unless they have been objected to at the time they were made, so that the trial court might have been accorded an opportunity to counteract their effect upon the jury.

ID.—VERDICT—DELIVERY OF FORM TO JURY FIXING PLACE OF IMPRISONMENT.—The delivery by the court to the jury in a homicide case of a form of verdict designating the place of imprisonment in case the defendant is found guilty, while improper, is not prejudicial as being suggestive.

APPEAL from a judgment of the Superior Court of Solano County. A. J. Buckles, Judge.

The facts are stated in the opinion of the court.

John R. Cronin, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted of murder of the first degree, the jury fixing the penalty at imprisonment in the state prison for life. (Pen. Code, sec. 190.)

This appeal is by the defendant from the judgment.

The homicide, resulting in the death of one E. G. Piercy from a gun-shot wound inflicted by the defendant, occurred at the Hotel Bird, in the town of Benicia, Solano County, on the night of the twentieth of February, 1913. The defendant was, at that time, and had been for some months previously, em-

ployed by the San Francisco Bridge Company, which was then operating in said town of Benicia. The defendant was the foreman of the drillers who were employed by said company. The deceased was a temporary guest at the hotel, having registered thereat only a few days prior to his death.

It is not denied that the defendant fired the shot which produced the death of Piercy. He interposed the defense of insanity, claiming that, when he fired the fatal shot, he was mentally deranged to such an extent that he could not and did not know the nature and quality and wrongfulness of his act.

It appears that a number of the guests of the hotel, including the wife of the proprietor and her sister, after the dinner hour on the day of the homicide, for the purpose of engaging in a social dance, repaired to a room in the hotel customarily used by traveling drummers in which to display samples of their goods and wares. This room is on the first floor of the hotel and adjoins the bar-room. The defendant's sleeping room was situated in the second story of the hotel and immediately over the sample room, in which the dancing was going on.

The defendant had been indulging heavily in intoxicating liquors during the early evening of the night of the homicide and at the time he fired the fatal shot was considerably under the influence of liquor. He appeared to be generally in a disgruntled mood and, during the evening and while the dancing was in progress, complained in the presence of several persons that the music produced by the electric piano annoyed him. At about 11 o'clock, he entered the sample room and, as one Camp was about to engage in a dance with Mrs. Bird, wife of the landlord, he (defendant) objected, but for what reason no one seemed to know. Camp said that the defendant appeared to object to his dancing with Mrs. Bird but that he "mumbled" so that he could not understand what he was saying. Camp then took the defendant out of the room into the bar-room. Camp then returned to the sample room. The defendant shortly thereafter went to his own room, procured a revolver, stepped to the door leading into the sample room, and from that point, and with the exclamation, "stop it, stop it, stop it," or words of similar import, fired five shots in rapid succession into the party, one of them striking and wounding one Chester C. Hoyt, one of the participants in the dancing

festivities, and another striking Piercy. The wound received by Hoyt was in the right thigh, and was not fatal. The point of entrance of the shot that struck Piercy was through the fleshy tissue of the right thigh and about two and a half inches below the crest of the hip bone. The deceased complained of pain in the bowels and an operation by the surgeons disclosed that the bullet had penetrated the bowels, causing four distinct perforations thereof. The bullet was found lying loose in the abdominal cavity, in the region of the left kidney. Piercy died the night following that of the shooting at about 11:30 o'clock. The attending surgeon testified that the wound was necessarily mortal.

The first point made by the defendant is that the court erred by refusing to grant his motion to set aside the information upon which he was tried and convicted upon the alleged ground that he "had not been legally committed by a magistrate." (Pen. Code, sec. 995.) The specific contention in this respect is that the magistrate before whom the defendant was examined failed or omitted, before the examination was proceeded with, or at any time during the progress of the proceedings, to "inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings." (Pen. Code, sec. 858.)

It appears from testimony taken on the motion to set aside the information that the accused, accompanied by his attorney, J. R. Cronin, appeared before the magistrate at the time fixed for the preliminary hearing, and that, before the taking of testimony was begun, the district attorney, addressing the defendant, "asked him if he was familiar with his rights" and he said "yes." Thereupon the district attorney, addressing Attorney Cronin, who was then engaged in conversation with the defendant, asked "if he would waive the reading of the complaint," to which question counsel answered in the affirmative. Thereafter the preliminary hearing of the charge against the accused was proceeded with, Mr. Cronin representing the defendant throughout the entire hearing and until its conclusion.

Section 860 of the Penal Code provides that "if the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a

reasonable time therefor, none appears, proceed to examine the case."

In this case counsel did appear for the defendant before the magistrate, and the magistrate was, therefore, authorized to proceed with the hearing. It was clearly unnecessary for the magistrate to go through the formality of advising the defendant of his right to the aid of counsel when it appeared that the latter had already exercised that right by employing an attorney to represent him at the hearing, the attorney so retained being present with the accused in the magistrate's court when the case was called for examination.

Nor does the fact that the complaint was not read to the defendant constitute, under the circumstances attending the omission to do so, a ground upon which it may justly be held that the accused had not been legally committed by the magistrate. Of course, a person who is brought before a magistrate on a criminal charge—that is, for a felony or other crime which is required to be preliminarily examined as a prerequisite to the filing of an information in the superior court—is entitled to be informed of the nature of the offense with which he is charged before the magistrate may proceed to take testimony or depositions in support of the charge. This information he is entitled to be provided with in order to enable him to prepare to meet the charge against him. The statute does not in terms declare that the complaint shall be *read* to the defendant, but the magistrate must *inform* him of the charge, and we apprehend that the mere statement by that official in a general way of the nature of the charge would satisfy the requirement in that regard. However, that the defendant in this case had knowledge of the contents of the complaint or of the nature of the charge therein preferred against him, is implied from the fact that the attorney representing him at the hearing waived the reading of the complaint in his presence and from the further fact that, through his attorney, he announced himself ready to proceed with the examination. Under such circumstances it would be carrying technicality to the extreme limit to hold that the case should be re-examined before a valid information could be based upon the commitment therein issued, merely because the formal reading of the complaint had been omitted by the examining magistrate, assuming that the statute contemplates

that the complaint must always be read in such cases. At any rate, the defendant certainly cannot claim that he suffered actual damage, either at the examination or at the trial, by such omission, and, assuming that the court below, in denying the motion to set aside the information, committed error, it is a mere technical error, innocuous in its effect upon the rights of the accused, and of which it cannot, consequently, be said, after an examination of the entire record, including the evidence, that it "has resulted in a miscarriage of justice." (Const. art VI, sec. 4½; *People v. Tomsky*, 20 Cal. App. 672, [130 Pac. 184].)

The point is made with apparent seriousness that the evidence does not justify the verdict because it fails to disclose that the act of the defendant in shooting into the crowd of dancers was accompanied by malice. "Murder is the unlawful killing of a human being, with malice aforethought." (Pen. Code, sec. 187), "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (Pen. Code, sec. 188.)

The evidence, as we have shown, discloses that the defendant seriously resented the noise produced by the electric piano in the room in which the dancing was going on and expressed himself as being greatly annoyed thereby. He was in a quarrelsome frame of mind during the entire evening, up to the time he fired the shots into the dancing party. He stepped to the door leading to the dancing room and making the exclamation above referred to, evidently thus referring to the music, deliberately fired into the party, with the result as already described. Even if it may in strictness be said that this evidence does not show express malice, it is certainly sufficient to warrant the implication of malice. There was no provocation for the shooting, and the circumstances clearly disclose, in our judgment, "an abandoned and malignant heart." It does not follow, merely because the defendant might not perhaps have entertained any personal ill-will toward the deceased, that the shooting and killing of the latter was not with the malice essential to the consummation of the crime of murder. The deliberate and unnecessary discharging of a

gun into a multitude of people, with an utter disregard of the consequences of the act, whereby human life is destroyed, is murder, and malice will be implied, although the perpetrator of the act had no malice against any particular person of the multitude into which he so fired. (Bishop's New Criminal Law, sec. 314, vol. 1, and sec. 688, vol. 2.)

It is next objected that the court erred to the serious prejudice of the rights of the accused in reading to the jury the instruction that, although the defendant, at the time he committed the act, was laboring under partial insanity, "if he still understood the nature and character of his act and its consequences, and had a knowledge that it was wrong and criminal, and he had mental power at the time sufficient to apply that knowledge, and to know if he committed the act he would be doing wrong, and receive punishment, and that he possessed a will sufficient to restrain the impulse he may have had to kill, arising from his diseased mind, then such partial insanity will not exempt him from responsibility, under the law, for such act, and you should find him guilty, in the degree shown by the evidence," provided the jury were convinced by the evidence beyond a reasonable doubt that the killing of the deceased by the defendant was without legal justification or legal excuse.

We perceive nothing erroneous in the general purport of the foregoing instruction. It has never been doubted in this state that a person may be held for a criminal act if, at the time of committing such act, he fully knew the wrongfulness and criminality thereof, notwithstanding that he may at the time be partly insane or a monomaniac upon some subject other than that to which his criminal act related. But the language of the instruction appears to go so far as to imply that even if the defendant was, at the time of the killing, fully capable of appreciating and knowing the nature and quality and wrongfulness of his act, he would be immune from responsibility if it was made to appear that he was, at the time, without sufficient volitional power to restrain himself from committing the act. If this be the true construction of the language of the instruction, it is to that extent erroneous. (*People v. Hoin*, 62 Cal. 120, [45 Am. Rep. 651].) Of course, a person having the mental capacity to know the wrongfulness and criminality of a certain act, has the capacity equal with such knowledge

to restrain himself from committing it, and where, under such circumstances, he does not so restrain himself but commits the act, his conduct in that regard will be ascribed by the law to a deliberate purpose or intent to do the wrong. That part of the instruction as so construed, however, was favorable to the defendant and he cannot, therefore, justly claim that he suffered any damage therefrom.

The court read to the jury several instructions, based upon and in the language of section 22 of the Penal Code, declaring that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition," but that where the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, evidence of the intoxicated condition of the accused at the time of committing the act is admissible and may be considered by the jury in determining the purpose, motive, or intent with which he committed such act. It is here argued that said instructions were without pertinency to any issue in the case, and that thus a factor was improperly injected into the case which "tended to confuse and did confuse the jury in arriving at its verdict." The instructions were peculiarly appropriate to the case as made by the evidence and, therefore, properly given. As seen, the sole defense was the claimed mental irresponsibility of the defendant at the time he committed the act, and his contention at the trial was that his insanity had been partly superinduced by an excessive use of intoxicating liquors prior to the time of the homicide. The claim of the district attorney was that he was not insane when he fired the fatal shot, but that he was merely in a state of intoxication, in which condition he had voluntarily placed himself. Considerable testimony was addressed to this feature of the case, and the people were entitled, of course, to have the law upon that subject explained to the jury. This the court did fully, clearly, correctly, and, as stated, most pertinently.

The instruction in which the court cautioned the jury to examine with care the defense of insanity interposed by the defendant "lest an ingenious counterfeit of the malady furnish protection to the guilty," is, to some extent, justly criticised, but we think its effect cannot be held sufficient to justify

a reversal of the case. The same instruction has often been given in criminal cases in which the insanity of the accused has been set up as a defense, and has received the approval of the supreme court. (See *People v. Dennis*, 39 Cal. 625; *People v. Bumberger*, 45 Cal. 650; *People v. Pico*, 62 Cal. 50, and *People v. Larrabee*, 115 Cal. 158, [46 Pac. 922].) In the case of *People v. McCarthy*, 115 Cal. 255, 264, 265, [46 Pac. 1073], however, the supreme court took occasion to criticise the instruction and to suggest that it were better never to read it to the jury, and with that suggestion we are in accord, as we regard such a statement by the court in its charge as verging too closely upon the domain of questions of fact—that is, as approaching an instruction upon the effect of the evidence. However, the court in that case held that, the instruction having been theretofore approved in several cases, a reversal could not be justly predicated thereon. (See *People v. Methever*, 132 Cal. 326, 330, [64 Pac. 481].)

The defendant makes a general objection to the action of the court in giving other instructions and in refusing to read to the jury a large number of instructions proposed by him. In his brief, the defendant does not point out the alleged errors thus referred to, but in effect suggests that this court will discover such errors by reviewing “all the instructions, given and refused by the trial court, so that more extended remarks in this brief on that subject are unnecessary.” But this court is not required to discharge a duty which rests entirely upon an appellant in a criminal case or his counsel. Where error is claimed in the rulings or instructions of the trial court, it is the duty of the party complaining on appeal to point out the error, otherwise it will not be reviewed, as it is not incumbent on a reviewing court to search through the record for the purpose of discovering for itself wherein the action of the court in the respect complained of involved error prejudicial to the defendant. (*People v. Chutnacut*, 141 Cal. 685, [75 Pac. 340]; *People v. Pembroke*, 6 Cal. App. 593, [92 Pac. 668]; *People v. Balmain*, 16 Cal. App. 33, [116 Pac. 303].) We have, however, carefully read the full charge of the court and, furthermore, have taken the pains to examine those instructions submitted by the defendant but rejected by the court, and thus we have found that the court’s charge clearly and correctly covered every essential phase of the case,

and that the rejected instructions referred to amounted only to a repetition of a statement of the principles which were declared to the jury in the general charge of the court.

It is urged that the district attorney, in his address to the jury, was guilty of misconduct which seriously militated against the defendant by declaring that, if there ever was a case arising in his experience of six years as district attorney, in which there was disclosed on the part of any man accused of murder "an abandoned and malignant heart— . . . an utter abandonment . . . to regard human life as sacred— . . . it is the case of this defendant, Andrew Stein, on trial here to-day for his life."

The foregoing language was, in our opinion, perfectly justified by the evidence. We have said as much in another part of this opinion. We can conceive of no stronger evidence of "an abandoned and malignant heart" than that which discloses the act of deliberately and recklessly discharging a gun into a crowd of people with a total disregard of the consequences thereof. But if it were to be said that the language was wholly unwarranted by the record and imported into the case matters wholly foreign to the issues, it is to be remarked that the defendant is hardly in a position justly to complain of any damage which might have followed therefrom, since it does not appear in the record that he objected to the remarks complained of when made or called the attention of the court thereto at the time, so that they could have been ordered stricken out and the jury instructed not to pay heed to them. Over and over again, the appellate courts of this state have held that objectionable remarks by the district attorney in a criminal case will not be reviewed or considered unless they have been objected to at the time they were made so that the trial court may be accorded an opportunity to counteract, if it can thus be done, their effect upon the jury. (*People v. Kramer*, 117 Cal. 647, 651, [49 Pac. 842]; *People v. Brittan*, 118 Cal. 409, 412, [50 Pac. 664]; *People v. Shears*, 133 Cal. 154, 159, [65 Pac. 295]; *People v. Ruef*, 14 Cal. App. 576, 619, [114 Pac. 48]; *People v. Amer*, 8 Cal. App. 137, 143, [96 Pac. 401]; *People v. Ah Fook*, 64 Cal. 380, 383, [1 Pac. 347]; *People v. Ye Foo*, 4 Cal. App. 730, 740, [89 Pac. 450]; *People v. Owens*, 3 Cal. App. 750, 752, [86 Pac. 980]; *People v. Beaver*, 83 Cal. 420, [23 Pac. 321]; *People v. Frig-*

erio, 107 Cal. 153, [40 Pac. 107]; *People v. Owens*, 132 Cal. 469, 471, [64 Pac. 770]; *People v. Salas*, 2 Cal. App. 537, 540, [84 Pac. 295]; *Horn v. State*, 12 Wyo. 162, [73 Pac. 705].)

Among the several forms of verdict which the court delivered to the jury upon the submission of the case, was the following: "We, the jury in this case, find the defendant, Andrew Stein, guilty of murder of the first degree, and further find that as a punishment for the same that the said Andrew Stein be imprisoned in the state's prison, at Folsom, for his natural life." Having, in the exercise of the discretion committed to them in that particular, decided to fix the penalty at imprisonment for life (Pen. Code, sec. 190), the jury returned their verdict in the foregoing form. It is now contended by the defendant that, inasmuch as the form of the verdict so delivered to the jury expressly named the particular prison in which the defendant should be confined if the jury concluded to fix the penalty, the action of the court in that respect was erroneous and prejudicial. It is argued that the form of the verdict as thus handed to the jury was "suggestive," and that the fact that the jury returned a verdict to which that form was appropriate shows that the act of submitting to them a verdict in that form had a prejudicial effect upon the minds of the jurors.

Obviously, while it is within the discretion of the jury in cases where they find that a homicide constitutes murder of the first degree to fix the penalty at imprisonment for life, it is not within their legal province to name or fix the particular prison of the two in this state in which the defendant shall be confined, since the statute confers upon them no such authority. The legislature evidently intended that that duty should be a function of the court, and it was improper, of course, to have expressly mentioned in the form of verdict the prison in which the accused should be incarcerated in case the jury, upon finding him guilty of murder of the first degree, fixed the penalty at life imprisonment. But the words "at Folsom," as used in the form of verdict, were mere surplusage, and could have exerted no influence on the minds of the jury in the determination of their verdict. We must presume that the members of the jury were possessed of sufficient intelligence to fully comprehend and understand the

instructions of the court that they were to be governed entirely, in reaching a conclusion upon the facts, by the evidence, and that thus they were guided in determining what their verdict should be and not by the trivial suggestion that a particular prison might be his place of confinement, in the event of his conviction of first degree murder and his punishment fixed by the jury in the exercise of the discretion confided to them by section 190 of the Penal Code as to the penalty in such cases.

We have now considered all the points pressed upon us for a reversal, and our conclusion is that the defendant was accorded a fair trial, that his conviction appears to be just and that the punishment meted out to him is merited.

Accordingly, the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 452. First Appellate District.—October 29, 1913.]

THE PEOPLE, Respondent, v. ROSY GUARAGNA, Appellant.

CRIMINAL LAW—INDICTMENT—PURPOSE OF PLEADING PARTICULARS.—

Primarily the purpose of precision in pleading the particulars of a crime is to preclude the possibility of a second prosecution for the same act, and at the same time to inform the defendant with reasonable certainty of that which he will be called upon to meet and defend against upon the trial.

ID.—ABORTION—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF INSTRUMENTS AND MANNER OF THEIR USE.—

An information charging an abortion is not insufficient because of failure to allege by name or description the character of the instruments alleged to have been employed, or of failure to specify the manner in which the instruments were used, where the doing of every act essential to the commission of the crime is alleged in the language of the statute, and it is specifically charged that the crime was committed by the use of "instruments in and about and within the body" of the alleged victim.

ID.—ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO REPUTATION OF ACCUSED.—In a prosecution for abortion it is not misconduct for

the district attorney in his argument to the jury to state that the evidence discloses that the defendant is generally reputed to be a professional abortionist, where positive testimony to that effect has been developed by counsel for the defendant upon cross-examination of the people's witnesses.

ID.—INSTRUCTION—REFUSAL BECAUSE COVERED BY OTHERS.—It is not error to refuse to instruct the jury that they should acquit the defendant if they find that the abortion charged was produced by means of drugs, and not, as alleged in the information, by the use of instruments, where the subject matter of such instruction is completely and correctly covered in the charge of the court.

ID.—EVIDENCE—SUFFICIENCY TO CONVICT OF ABORTION.—In this prosecution for abortion the evidence, direct, circumstantial, and opinion, is amply sufficient to justify the finding of the jury implied from the verdict that the defendant, by means of instruments of some kind, committed the crime charged.

ID.—EVIDENCE—GENERAL ASSIGNMENT OF ERROR—REVIEW ON APPEAL.—Where some eighteen rulings upon the admission or rejection of evidence are generally assigned as error, and no particular point concerning any one of the rulings is discussed in the brief of the appellant, but the appellate court is merely referred to the pages and folios of the transcript where the objections and rulings are to be found, it will not examine and pass upon points thus presented.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. William H. Donahue, Judge.

The facts are stated in the opinion of the court.

H. D. Gill, W. S. O'Brien, and Frank Sprague, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LENNON, P. J.—The defendant was convicted of the crime commonly called abortion, and which is defined by section 274 of the Penal Code. She has appealed from the judgment, and from an order denying her motion for a new trial.

The charging part of the information was not demurrable upon the ground of uncertainty. Primarily the purpose of precision in pleading the particulars of a crime is to preclude the possibility of a second prosecution for the same act and at the same time to inform the defendant with reasonable cer-

tainty of that which he will be called upon to meet and defend against upon the trial.

The information in the present case alleged in the language of the statute the doing of every act essential to the commission of the crime as defined by section 274 of the Penal Code, and specifically charged that such crime was committed by the use of "instruments in and about and within the body" of the person named as the victim of the alleged abortion. This being so, it is obvious that the judgment of conviction in the present case could be readily and successfully pleaded as a bar to a second prosecution of the defendant for the acts charged in the present information. True, the information did not by name or description indicate the character of the instruments alleged to have been employed in the commission of the offense, nor did it specify the manner in which such instruments were used. Nevertheless, in its entirety it fairly and with sufficient certainty informed the defendant of all that was reasonably necessary for her to know in order to prepare and present an intelligent and honest defense. It was not absolutely necessary to allege the name of the instrument used to produce the abortion. (*State v. Reed*, 45 Ark. 333; *Commonwealth v. Noble*, 165 Mass. 13, [42 N. E. 328]; *Commonwealth v. Thompson*, 159 Mass. 56, [33 N. E. 1111]; *Commonwealth v. Corkin*, 136 Mass. 429; *Commonwealth v. Jackson*, 15 Gray (Mass.), 187; *People v. Lohman*, 2 Barb. (N. Y.) 216, 220.)

The information would have been good beyond cavil if it had alleged that the character of the instrument employed to produce the abortion was unknown. (*Baker v. People*, 105 Ill. 452.) This must be so; otherwise crimes of the character under discussion would frequently go unpunished. Obviously an allegation that the instruments used were unknown would not have rendered the information more certain or efficacious than it is in its present form; and therefore we cannot conceive of any sound reason why the information would not be equally good without such allegation.

The allegation that the instruments employed to produce the abortion were used "in and about and within the body" of the person who submitted to the operation, sufficiently indicated the manner in which the offense was committed. The meaning of this allegation should be clear to every person

of ordinary intelligence; and the contention that it might be construed to mean that the instruments were inserted in the nose or the ear cannot be taken seriously.

The district attorney did not transgress the limits of legitimate argument in his presentation of the people's case to the jury. He was well within the record when he declared that the evidence upon the whole case disclosed that the defendant was generally reputed to be a professional abortionist. This declaration was not the result of a mere deduction from the evidence, but was based upon positive testimony developed by counsel for the defendant upon cross-examination of two of the people's witnesses, to the effect that the defendant was generally reputed to be engaged in the business of producing abortions. The fact that this testimony was developed upon cross-examination did not detract from its value as evidence, nor preclude the district attorney from commenting upon it.

The trial court did not err in refusing to give certain requested instructions, which were to the effect that the jury should acquit the defendant if it found that the abortion charged was produced by means of drugs and not, as alleged in the information, by the use of instruments. The subject matter of these instructions was clearly, completely, and correctly covered in the charge of the court.

The evidence is sufficient to support the verdict and judgment. The testimony produced upon the trial is too voluminous to be even summarized in this opinion; and therefore it must suffice for us to say that upon a careful reading of the record we are satisfied that the evidence upon the whole case, direct, circumstantial, and opinion, was amply sufficient to justify the finding of the jury implied from the verdict that the defendant, by means of instruments of some kind, committed the crime charged in the information, with the knowledge, intent, and purpose therein alleged.

It was objected at the trial that the hypothetical question put to the prosecution's expert witnesses was not based upon the evidence in the case. When directed by the trial court to point out wherein the question was deficient in its statement of the evidence, counsel for the defendant designated only one particular in support of his objection. The record shows that the question objected to conformed to the evidence in the particular pointed out, and in its entirety fully and fairly

stated the evidence adduced upon the whole case. The objection, therefore, was not well taken and was rightfully overruled.

Some eighteen rulings of the trial court made upon the admission or rejection of evidence are generally assigned as error. No particular point concerning any one of these rulings is discussed in the brief of counsel for the defendant. We are merely referred to the pages and folios of the transcript where the objections and rulings are to be found. This court is not required to examine and pass upon points thus presented. (*People v. Woon Tuck*, 120 Cal. 294, [52 Pac. 833]; *People v. McLean*, 135 Cal. 306, [67 Pac. 694]; *People v. Cebulla*, 137 Cal. 314, [70 Pac. 181]; *People v. Chutnacut*, 141 Cal. 682, [75 Pac. 340].)

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1302. First Appellate District.—October 29, 1913.]

WILLIAM NICOL COMPANY (a Corporation), Respondent, v. DOROTHEA CAMERON, as Executrix of the Will of William Ladd, Deceased, Appellant.

ESTATE OF DECEDENT—ACTION ON CLAIM—SUFFICIENCY OF COMPLAINT.—

A complaint, in an action against an executor on a promissory note executed by the decedent, which alleges the nonpayment of the original obligation and its due presentation to and rejection by the executor, sufficiently states a cause of action, and it is not necessary to further aver that the executor has not paid the claim.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

D. I. Mahoney, for Appellant.

A. G. Lyon, for Respondent.

RICHARDS, J.—This is an action upon a claim presented to the appellant, as executrix of the last will of William Ladd, deceased, based upon a promissory note for the sum of three hundred dollars, executed by said decedent to plaintiff in his lifetime and unpaid at the time of his decease.

In its second amended complaint the plaintiff sets forth the note in full, with the usual averments of the due execution and delivery of the same, and then avers the death of the decedent, the due appointment of appellant as the executrix of his estate, the proper presentation of the claim, and the averment that the executrix "had neglected and refused and still neglects and refuses to approve said claim."

To this complaint the executrix answered in the form of a general denial, and thereafter and at the time of the trial the plaintiff was allowed to amend his said complaint by adding the averment "that said note has not been paid."

The case was tried upon the issues thus presented; and plaintiff having recovered judgment for the amount of its claim and for its payment in due course of administration, the executrix prosecutes this appeal upon the judgment-roll.

It is the contention of the appellant that the complaint does not state facts sufficient to constitute a cause of action for the reason that it is not averred therein that "the *claim* has not been paid."

This contention is without merit. The complaint averred that the note had not been paid, and that the executrix had neglected and refused and still neglects and refuses to approve the claim. The defendant did not demur to the complaint, but answered to the merits, and went to trial and judgment without, so far as the record shows, making any point as to the sufficiency of the complaint in the lower court. At worst, we think the complaint was only subject to a special demurrer upon the ground of uncertainty, which not having been presented, the point was waived.

Aside from this suggestion, however, it may be said that in an early and well considered case differing in no material respect from the case at bar, it was held that a complaint, alleging the nonpayment of the original obligation and its due presentation to and rejection by the administrator, sufficiently stated a cause of action, and that it was not necessary to

further aver that the administrator had not paid the claim. (*Wise v. Hogan*, 77 Cal. 184, 188, [19 Pac. 278].)

The appellant also contends that the findings are insufficient to support the judgment; but since this objection is wholly based upon the first contention of the appellant as to the sufficiency of the complaint it must necessarily fall with that contention.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1197. First Appellate District.—October 30, 1913.]

JOHN HASTARAN et al., Respondents, v. CANNIE B. MARCHAND, Appellant.

APPEAL—STATEMENT OF CASE—SPECIFICATION OF ERRORS—SUFFICIENCY OF EVIDENCE.—A statement of the case on motion for a new trial, which does not specify nor attempt to specify the particulars in which the evidence is claimed to be insufficient to justify the findings, cannot be considered, either upon the appeal from the order denying a new trial or on the appeal from the judgment, for the purpose of determining the sufficiency of the evidence.

ID.—INSUFFICIENT STATEMENT—WHETHER CURED BY OTHER DOCUMENTS IN TRANSCRIPT.—The failure of such statement to specify the particulars in which it is claimed the evidence is insufficient, is not cured by the incorporation, elsewhere in the transcript, of two separate documents entitled "Bill of Exceptions," one of which contains several specifications of the insufficiency of the evidence intermingled with argument and the citation of authorities, and the other made up of specifications of errors in law alleged to have occurred during the trial, neither documents being authenticated by the trial judge, nor referred to in the authenticated statement or made a part thereof, nor purporting to set out in narrative form or otherwise the evidence and rulings at the trial, although upon the diminution of the record there was indorsed thereon the certificate of the trial judge that such documents were used on the hearing of the motion for a new trial.

ID.—SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—THEIR OBJECT AND PURPOSE.—The specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are not required merely for use upon the hearing of the motion for a new trial, but are

intended primarily, if not entirely, for the information of the adverse party and the trial court, to the end that they may be fully advised upon the settlement of the statement or bill of exceptions as to what matters of evidence covering the points in controversy should be included therein.

ID.—BRIEFS ON APPEAL—NECESSITY OF STATING OR ARGUING ERRORS OF LAW.—Alleged errors of law relating to the reception and rejection of testimony, not stated or argued in the brief of the appellant, but merely adverted to in a general way in an unauthenticated document purporting to be a bill of exceptions, will not be considered by the appellate court.

ID.—STATEMENT OF CASE—ERRORS OF LAW—WHEN REVIEWABLE.—Errors of law appearing either in a proper statement of the case or bill of exceptions may be reviewed upon an appeal from the judgment, regardless of whether or not an appeal has been perfected from an order denying a new trial.

ID.—OBJECTION TO EVIDENCE—NECESSITY OF INTERPOSING.—Errors of law in the admission of evidence are not available on appeal, if no objection was made to the reception of the evidence.

ID.—SUFFICIENCY OF EVIDENCE—PRESUMPTION ON APPEAL.—In the absence of an efficient statement of the case or a bill of exceptions, an appellate court must assume that the evidence adduced at the trial fully supports the findings, and justified the denial of a new trial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial. Frank H. Smith, Judge presiding.

The facts are stated in the opinion of the court.

A. Heynemann, C. F. Adams, and Lande & Woodworth, for Appellant.

J. K. Ross, for Respondents.

LENNON, P. J.—This is an appeal from a judgment rendered in favor of the plaintiffs and also from an order denying the defendant a new trial.

The action was one to rescind a contract of purchase and sale of personal property and for the recovery of the purchase price thereof, upon the ground of fraud. The case was tried by the court without a jury, and findings were made in favor of the plaintiffs in substantial accord with the allegations of the complaint. Judgment was entered upon the findings on September 7, 1911, and on the following day defendant served

and filed her notice of intention to move for a new trial upon the grounds of errors of law occurring during the trial, and the insufficiency of the evidence to justify the findings.

The notice of intention stated that the motion would be made upon affidavits to be thereafter filed, a statement of the case, and also a bill of exceptions to be thereafter prepared. On March 25, 1912, an engrossed "statement of the case on motion for a new trial" was allowed and authenticated by the certificate of the trial judge. The motion for a new trial was heard and denied on April 8, 1912.

In support of the appeal it is urged that in certain particulars the evidence is insufficient to support the findings of fact as made by the trial court.

This point cannot be considered, either upon the appeal from the judgment or from the order denying the new trial, for the reason that the statement of the case appearing in the record before us does not specify nor attempt to specify the particulars in which the evidence is claimed to be insufficient to justify the findings. (*Sather Banking Co. v. Briggs*, 138 Cal. 724, [72 Pac. 352].) Section 659 of the Code of Civil Procedure, provides that "When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. . . . If no such specification be made the statement shall be disregarded on the hearing of the motion." Inasmuch as the statement of the case before us does not even attempt to specify the particulars in which it is claimed that the evidence is insufficient to support the findings, it must be assumed in support of the order appealed from that the lower court, in passing upon the motion for a new trial, ignored, as was its duty, the statement of the case prepared and presented by the defendant. This being so, it follows that the motion for a new trial, in so far as it was grounded upon the insufficiency of the evidence, was in effect made without a statement of the case to support it; and the defendant having elected to move upon such a statement, his failure to prepare and perfect it in the particulars required by the code precluded the lower court from passing upon the sufficiency of the evidence, and, therefore, in so far as that question was concerned, the motion for a new trial was properly denied.

The reasoning which requires us to reject the defendant's statement of the case when considering the appeal from the order denying a new trial, likewise precludes us from considering that statement upon the appeal from the judgment in so far as the sufficiency of the evidence to support the findings is concerned. Section 950 of the Code of Civil Procedure provides that on an appeal from a final judgment the appellant must furnish the court with (1) a copy of the notice of appeal; (2) the judgment-roll; and (3) of any bill of exceptions or (4) statement of the case on which the appellant relies. For the purpose of an appeal from the judgment there is little difference between a bill of exceptions and a statement of the case. "Their form is the same, the proceeding to settle them is the same, they perform the same office, and may be used interchangeably." (2 Spelling's New Trial, sec. 629.) Accordingly, any statement of the case which has been settled and authenticated as required by law, and which was used or which was prepared, settled, and authenticated for use upon a motion for a new trial, may be resorted to by this court upon an appeal from a judgment which involves errors of law claimed to have been committed upon the trial, or the alleged insufficiency of the evidence to support the findings. (2 Hayne on New Trial, revised ed., sec. 250.)

This, however, presupposes that upon an appeal from the judgment grounded upon the insufficiency of the evidence the "bill of exceptions" or "statement of the case" accompanying the judgment-roll was prepared and perfected in accordance with the provisions of section 648 of the Code of Civil Procedure, which requires that "when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." The purpose of this requirement is practically the same as that of section 659 of the same code relating to the necessity of specifications of insufficiency in a statement of the case on a motion for a new trial. Therefore, upon the appeal from the judgment in the present case, the sufficiency of the evidence to support the findings cannot be reviewed upon the statement of the case before us. (2 Hayne on New Trial, sec. 259.)

The defendant insists that the neglect of the statement to specify the particulars in which it is claimed the evidence was insufficient was covered, and therefore cured, in two separate documents entitled "Bill of Exceptions," which are printed elsewhere in the transcript, and purport to have been filed in the action some five months previous to the allowance and authentication of the defendant's "Engrossed statement of the case on motion for a new trial."

The first of these documents contains several specifications of the insufficiency of the evidence intermingled with argument and the citation of authorities. The second is made up of specifications of errors in law alleged to have occurred during the trial. Neither document, however, purports to set out in narrative form or otherwise the evidence and rulings had and made at the trial. Moreover, neither document was authenticated by the judge of the trial court, and, therefore, neither can be said to be a bill of exceptions in form or in fact. Neither document was included in nor referred to in the authenticated statement of the case which was finally settled and allowed by the trial court. Obviously they cannot be considered for any purpose upon this appeal.

This case was heard once before by this court, and upon the point just stated was decided adversely to appellant. In the petition for a rehearing our attention was called to the fact that prior to the filing of briefs and before the oral argument upon the first hearing a diminution of the record upon motion of the appellant was ordered, so as to show that the trial judge had indorsed upon each of the two unsettled and unauthenticated documents entitled "Bill of Exceptions" the following certificate: "I hereby certify that the foregoing specifications were used before me on the argument on motion for a new trial. Frank H. Smith, Judge. September 20, 1912." Although permission was granted counsel for the appellant at the time the diminution was suggested and ordered to amend the record before us by inscribing thereon with pen and ink the above-mentioned certificate, such amendment was not made until after our opinion in the first instance affirming the judgment had been filed; and although permission had been granted previous to the filing of appellant's brief to amend the record in the particulars and manner stated no mention or point was made either in the briefs of counsel for the appellant

or upon the oral argument of the fact that the trial judge had used the disputed documents upon the hearing of the motion for a new trial. We were justified, therefore, in assuming, as we did, upon the first hearing that the suggested diminution of the record was not considered by counsel for the appellant, as a matter of sufficient moment to be considered by us upon the determination of the appeal. A rehearing, however, was granted largely because of the earnest insistence of counsel for appellant that such certificate obviated the objections which resulted in the affirmance of the judgment in the first instance.

Upon further consideration we are satisfied that even as finally amended the record before us will not sustain the appeal upon the ground of the insufficiency of the evidence to support the findings.

The case of *Dawson v. Schloss*, 93 Cal. 195, 201, [29 Pac. 31], hurts rather than helps appellant, for there it is declared that the primary purpose of the rule requiring specifications of evidence "in statements on motion for a new trial and in bills of exceptions is to abbreviate the statement of evidence by restricting it to such as is relevant or material to prove or disprove the specified fact. By the specifications required the opposing party and the judge are notified of the exact points of contest, and thereby enabled to determine what evidence should be brought into the statement and what should be excluded therefrom. Without such specifications the judge could not perform the duty enjoined upon him 'to strike out of it (the statement or bill of exceptions) all redundant and useless matter,' and to make the statement truly represent the case (Code Civ. Proc., secs. 650, 659); nor would the opposing party have any means of distinguishing what portions of the evidence would be redundant from that which tends to prove the issue on his part; and the consequence would generally be that all the evidence would be brought into the statement or bill of exceptions though nine-tenths of it were irrelevant and useless. So important were the required specifications in a statement on a motion for a new trial regarded by the legislature that it enacted 'If no such specifications be made the statement shall be disregarded on the hearing of the motion.' (Code Civ. Proc., sec. 659), and this penalty has been enforced

by this court in so many causes that there seems to be no excuse for failure to comply with the code rule. . . . ”

It will thus be seen that the specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are not required merely for use upon the hearing of the motion for a new trial, but are intended primarily, if not entirely, for the information of the adverse party and the trial court, to the end that they may be fully advised upon the settlement of the statement or bill of exceptions as to what matters of evidence covering the points in controversy should be included therein. (*Cortelyou v. Imperial Land Co.*, 166 Cal. 14, [134 Pac. 981].)

In the present case the statement, which was settled for use and subsequently used upon the motion for a new trial, is, as has been previously pointed out, utterly devoid of specifications or attempted specifications of the insufficiency of the evidence to sustain the findings made by the trial court; and therefore neither the trial court nor the adverse party was required upon the settlement of the statement to ascertain whether or not all of the evidence adduced upon the trial and upon which the findings were made was incorporated in the statement as originally prepared and presented for settlement. Perchance if the insufficiency of the evidence to sustain all or any one of the findings made by the trial court had been specified in the statement as submitted for settlement, amendments would have been proposed and allowed which would have covered the points in controversy.

It is contended, however, upon behalf of the appellant that the certificate of the trial judge which has been added to the record shows that he had before him at the time of the settlement of the statement the specifications of insufficiency contained in one of the two unsettled and unauthenticated documents entitled “Bill of Exceptions,” and we are therefore requested to consider those specifications as part and parcel of the settled and authenticated statement of the case which was used upon the motion for a new trial.

This contention is not supported by the record before us, and the request following it must be ignored. It may be conceded that generally the legal effect of a document must be determined by a consideration of its subject matter rather than by the name given to it; and when its real character is

thus ascertained its scope and effect cannot be ignored because of a mere misnomer. It may also be conceded that a statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either (*Spottiswood v. Weir*, 66 Cal. 525, [6 Pac. 381]; *Martin v. Southern Pacific Co.*, 150 Cal. 124, [88 Pac. 701]); and we have no doubt that if in the present case the two unsettled and unauthenticated documents entitled "Bill of Exceptions"—one of which specified the insufficiency of the evidence and the other the errors of law—had been, by reference or otherwise, made a part of the proposed statement on motion for a new trial, they would have constituted sufficient specifications of the insufficiency of the evidence and the errors of law relied upon for a new trial.

No such situation, however, confronts us here. In the first place both of the documents in the present case entitled "Bill of Exceptions" plainly purported only to set forth disconnected fragments of the evidence adduced upon the trial of the case, and neither of such documents was, directly or by reference, authenticated by the certificate of the trial judge. Clearly, therefore, they lack the essentials of an efficient bill of exceptions. In the second place, the record before us, as originally prepared and as subsequently amended, shows unequivocally that the two documents in question were neither directly nor by reference made a part of the proposed statement on motion for a new trial. The record shows further that the "Engrossed statement on motion for a new trial" was filed, settled, and authenticated some five months subsequent to the filing of the two unsettled and unauthenticated documents entitled "Bill of Exceptions," and it does not show that either of such documents was called to the attention of the trial judge nor considered by him before the time of the hearing of the motion for a new trial, which, of course, must have been subsequent to the settlement and authentication of the statement of the case upon which the motion for a new trial was made and determined.

This being so there is no escape from the conclusion that the two unsettled and unauthenticated documents entitled "Bill of Exceptions" were not a part of the proposed statement on motion for a new trial, nor considered by the trial court upon the settlement of such statement. Standing alone, as it must,

the settled and authenticated statement did not contain the required specifications of insufficiency, and therefore it must be held in compliance with the rule annunciated in the authorities hereinbefore cited and quoted, that such statement could not be used upon the hearing of the motion for a new trial nor resorted to upon this appeal in so far as the sufficiency of the evidence to support the findings is concerned.

The opening brief of counsel for the appellant consisted solely of a discussion of the sufficiency of the evidence to support the findings; but in the closing brief alleged errors of law relating to the reception and rejection of testimony are adverted to in a general way. For instance, without pointing out the particular errors relied upon for a reversal, we are advised and admonished that "It is for the appellate court to determine whether or not this testimony was properly excluded, or whether the testimony given was properly admitted"; and we are then referred to the two unsettled and unauthenticated documents already described, where, we are told, will be found "the errors of law . . . and the authorities supporting the points. . . ."

Neither this court nor counsel for the respondent is required to examine and answer points and authorities presented in such manner (*People v. Woon Tuck Wo*, 120 Cal. 294, [52 Pac. 833]; *People v. McLean*, 135 Cal. 306, [67 Pac. 770]; *People v. Cebulla*, 137 Cal. 314, [70 Pac. 181]; *People v. Chutnacut*, 141 Cal. 682, [75 Pac. 340]; *Duncan v. Ramish*, 142 Cal. 686, [76 Pac. 661]; *Bell v. Southern Pacific Co.*, 144 Cal. 560, [77 Pac. 1124]; *Pigeon v. Fuller*, 156 Cal. 691, [105 Pac. 976]; *Perry v. Ayers*, 159 Cal. 414, [114 Pac. 46]). In fairness to this court and to counsel for respondents every point relied upon for a reversal should have been stated and argued in the opening brief of counsel for the appellant; and therefore points not so stated and argued may be deemed to be waived (*Hihn v. Courtis*, 31 Cal. 399; *Webber v. Clarke*, 74 Cal. 11, [15 Pac. 431]; *Wheelock v. Godfrey*, 100 Cal. 578, [35 Pac. 317]; *Odell v. Buttrick*, 126 Cal. 551, [159 Pac. 133]).

It is true that one of the documents referred to consists mainly of argument and the citation of authorities directed to alleged errors of law specified therein; but we do not understand, nor can it be successfully contended, that the irregular interpolation of points and authorities in a bill of exceptions,

or a document purporting to be such, will suffice as an opening brief upon appeal, and thereby require this court and counsel for the respondent to investigate and answer the points so made. However, having in mind the rule that errors of law appearing either in a proper statement of the case or bill of exceptions may be reviewed upon an appeal from the judgment, regardless of whether or not an appeal has been perfected from an order denying a new trial, we have out of an abundance of caution, not unmingled with some curiosity, examined the authenticated statement of the case which was used upon the motion for a new trial, and find that it does not, either by reference to the notice of intention or otherwise or at all, specify any error of law occurring at the trial. Such statement, therefore, considered merely as a statement and not as a bill of exceptions, cannot be resorted to for the purpose of disposing of alleged errors of law (Code Civ. Proc., sec. 659, subd. 3; *Shadburne v. Daly*, 76 Cal. 355, [18 Pac. 403]). Of course, if such statement be considered a bill of exceptions (as may be done) specifications of error would not be necessary to review any alleged errors of law appearing therein (Code Civ. Proc., sec. 650; *Martin v. Southern Pacific Co.*, 150 Cal. 125, [88 Pac. 701]). But treating the statement as a bill of exceptions we find upon a careful review thereof that all of the evidence set forth therein was offered and received without the interposition of a single objection. This being so it is obvious that the errors of law, if any, occurring at the trial are not in any event available to appellant upon this appeal.

Upon the first hearing of this case appellant, in an endeavor to have us consider everything which is to be found between the covers of the transcript, asserted that the appeal was taken under the new or alternative method provided by sections 941a et seq. of the Code of Civil Procedure. This position, however, was finally and expressly abandoned upon rehearing, and therefore need not be further discussed. No error appears on the face of the record before us; and in the absence of an efficient statement of the case or bill of exceptions we must assume that the evidence adduced at the trial fully supports the findings, and justified the denial of a new trial.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1170. Third Appellate District.—October 30, 1913.]

W. I. REED; Respondent, v. W. V. WITCHER et al., Defendants and Appellants, and ALICE S. BLAKE, Trustee, Defendant.

VENDOR AND VENDEE—RECOVERY OF DEPOSIT—TENDER OF BALANCE OF PURCHASE PRICE AS CONDITION PRECEDENT.—The rule that one who has contracted to purchase real property and has paid a deposit thereon, cannot recover his deposit without tendering payment of the balance of the purchase money, is applicable only where neither the pleadings nor the evidence present an excuse for not making tender of the full purchase price.

ID.—ACTION TO RECOVER DEPOSIT—DELAY IN DEMAND—TENDER OF BALANCE.—Where a contract for the purchase of real estate provides that if the title is found imperfect and cannot be perfected within ninety days the agreement shall be terminated and the deposit returned, and the vendor is unable to make title, not only within the ninety days, but, if at all, for a long time thereafter, the vendee does not lose his right to recover the deposit by not demanding a return of the money and declaring the contract at an end until a few days after the expiration of the ninety days, and he is not required to tender the balance of the purchase price.

APPEALS from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. Henry C. Gesford, Judge presiding.

The facts are stated in the opinion of the court.

Mastick & Partridge, and J. M. Mannon, Jr., for Appellants.

C. L. Colvin, and F. E. Whitney, for Respondent.

CHIPMAN, P. J.—Plaintiff commenced this action to recover a deposit of two thousand five hundred dollars paid on account of the purchase price of certain real property situated in the city of Oakland. Plaintiff had judgment and defendants' motion for a new trial was denied. Appeals have been taken from the judgment and from the order denying the motion for a new trial.

The nature of the contract and the issues presented in the pleadings sufficiently appear from the findings of the trial court.

After the contract was executed, which is dated November 14, 1906, defendant, Alice S. Blake, died, and defendant, William Vincent Witcher, Jr., was appointed executor of her will and estate. Plaintiff presented a claim to said executor for the amount in this action mentioned which was rejected. No point arises as to the sufficiency of the steps thus taken by plaintiff. At the close of the evidence plaintiff, by leave of the court, made certain amendments to his complaint to conform to the evidence.

The court found: 1. That the foregoing contract was entered into by plaintiff and the other signers of the contract, "wherein and whereby plaintiff agreed to buy and said defendants agreed to sell to plaintiff an undivided one-half interest in and to the land in said contract described"; 2. That at the time of the execution of said contract an undivided two twenty-fourths interest in said property was vested in Beach Carter Soule, Jr., and Everett Pomeroy Soule, both minors, and at said time and prior thereto an action was pending in the superior court of Alameda County, to determine what interest said minors had in said property, and defendants, Alice S. Blake, trustee, and Alice S. Blake as an individual and said Helen T. Witcher, were parties to said action; that at said time "the undivided $\frac{1}{2}$ of said property owned by defendants, Witcher and Alice S. Blake, was subject to a deed of trust to secure a loan of \$40,000"; that at the same time there were four leases of record covering portions of the property, which had not expired "and were purported to have been signed by defendants through their agent, and the lessees named in said leases were in possession . . . and the said defendants were then, and have been since the execution of said leases, collecting and receiving rent from said tenants"; that said defendants at the time said contract was executed "denied that the said minors aforesaid had any interest in the property" and the action was "to determine whether or not the said minors had acquired any interest therein under the will of Francis M. Blake, deceased"; that "all the foregoing facts were well known to said defendants, and to each of them, at the time of the execution of the contract aforesaid"; that by the terms of the contract it was agreed that plaintiff should have thirty days from its date in which to examine the title and if found imperfect "and could not be perfected within

ninety days from and after the date thereof, the said agreement should be terminated and said deposit of \$2,500.00 returned to plaintiff"; 3. That plaintiff paid to defendants Blake, Witcher, and Witcher, a deposit of two thousand five hundred dollars on the purchase price of said property; 4. That plaintiff, within the said thirty days, examined the title to said property, "partly from abstracts furnished him by the defendants above named, and found the title thereto imperfect in the particulars hereinabove mentioned, and on the 11th day of December, 1906, made and served upon the said defendants and on the owners of the other undivided one-half of said property, a notice that within the thirty days specified in the contract he "will have completed the examination of the title to said property and will be prepared to consummate by paying for said property the remainder of the purchase price . . . on the execution and delivery to me of a good and sufficient grant, bargain and sale deed conveying the said property with good and sufficient title free and clear of all encumbrances. Kindly advise me as soon as practicable when and where we can meet to consummate said contract and arrange for transfer of the aforesaid property"; that "said notice was given by plaintiff to said defendants and each of them, by mail, and the said plaintiff received no reply whatever thereto"; that thereafter, to wit, on February 13, 1907, plaintiff served upon defendants and the owners of the other undivided one-half of said property a notice in writing, that the title to said property is defective in the following particulars: "1st. I find that the conveyance from the executor of the last will of James Moffitt, deceased, taken in connection with the deeds of Alice S. Blake as an individual and as trustee, W. V. Witcher and Helen F. Witcher, would not convey the whole title to the property. There would still be an interest outstanding and as far as I have been able to ascertain no steps have been taken to secure a conveyance of this interest." "2d. The property is encumbered by leases which have not been released. This latter objection I think may be adjusted, providing the other outstanding interest can be obtained." Attention is called to the contract giving defendants ninety days in which to perfect the title if it can be done within that time; that their attention has been called to it before and they have done nothing "to straighten the matter

out so that full ownership of the property may be conveyed to me as contemplated by my contract." "As soon," the letter continues, "as the whole title can be passed I am ready to comply with the agreement on my part. Kindly give this matter your attention and notify me promptly when you are ready." A description of the property is then set out in the letter. Still quoting from the findings, the court found "that said last mentioned notice was served by plaintiff on said defendants and each of them by mail, and said plaintiff received no reply whatever thereto." "5. That ninety days elapsed from and after the date of said agreement without the title to said property being perfected, and the said defendants were not able during that time, or otherwise, or at all, to perfect the title to said property, or to deliver to plaintiff a good and sufficient deed to said property conveying the same to him free and clear of all encumbrances, and never at any time proffered or tendered to plaintiff a good and sufficient deed conveying to him the said described property free and clear of encumbrances. That during all of said times none of the leases above referred to was released, and the interest and property covered by the deed of trust above referred to was not reconveyed"; that during all said time the action to determine the interest of said Soule minors was pending in the superior court and was not finally determined until the decision of the supreme court on March 28, 1910; that during all the time from November 14, 1906, up to March 28, 1910, the said defendants "could not convey to said plaintiff an undivided one-half interest in and to said property described in said written agreement free and clear of encumbrances and that all of said facts mentioned in this paragraph were well known to the said defendants during all of said time." 6. That on May 31, 1907, plaintiff delivered to defendants a notice in writing stating that as they had failed to comply with the said agreement, "within the time specified or at all, said agreement is ended and terminated; and demand is hereby made upon you and each of you, for the return of the money deposited by me with you on account of said agreement, to wit: the sum of twenty-five hundred dollars"; that "said plaintiff did not, prior to the service of said notice, or otherwise, or at all, tender to defendants the balance of the purchase price . . . except as shown by the notice made and served

by him on the 11th day of December, 1906, as hereinafter set forth"; that at no time between the date of said contract and the serving of the notice on May 31, 1907, "did plaintiff have cash on hand, or subject to his call in any bank . . . a sum in excess of the sum of \$100,000, but had other property sufficient in value to enable him to raise the balance on said contract, and during all said times plaintiff was able, ready, and willing to perform the terms and conditions of the contract to be performed by him; that plaintiff duly performed all the terms . . . to be performed by him." 7. That "defendants failed, refused, and neglected to comply with said demand and have ever since failed, refused and neglected to comply therewith or to return to plaintiff the said deposit of \$2,500, or any part thereof and neither the whole nor any part of said sum of \$2,500 has been paid or returned to plaintiff."

As conclusions of law the court found that plaintiff is entitled to recover from defendants the sum of two thousand five hundred dollars with interest from May 31, 1907, and costs.

Plaintiff alleges two causes of action—one on the contract and the other for money received by defendants to the use of plaintiff, which they agreed to pay plaintiff on demand. The court, in addition to the foregoing findings, found the averments in the second cause of action to be true.

The sufficiency of the evidence to support the findings is not challenged nor is any question raised in the briefs on the rulings of the court in admitting or rejecting evidence.

Appellants make but two points—first, that "One who has contracted to purchase realty and has paid a deposit thereon, cannot recover his deposit without tendering payment of the balance of the purchase money; and second, that defendants' defective title did not excuse plaintiff's failure to tender the purchase money."

Upon the first proposition, appellants rely on *Englander v. Rodgers*, 41 Cal. 420, 422. The principle there enunciated is that "to entitle the plaintiff to maintain the action on the contract set out in the complaint he should have averred tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it." The case went off on demurrer to the complaint and, as the complaint failed to allege either tender or any excuse for the omission, the demurrer was sustained. In *Merrill v. Merrill*, 95 Cal. 334,

[30 Pac. 542], the court is careful to point out by the use of italics the qualification which certain facts may impose upon the rule in the Englander case—for example—“neither could put the other in default, except by tendering a performance on his own part, *or by his conduct rendered it unnecessary*,” and again, “he should have averred a tender of the unpaid portion of the purchase money, or *some excuse* for the omission to tender it.” In the Merrill case the court was of the opinion that sufficient facts were alleged to “show that a tender of the purchase money and demand for the deed would have been of no avail.” *Wood v. McDonald*, 66 Cal. 547, [6 Pac. 453], is cited, where the court said: “Proof of any circumstance which would satisfy a jury that a demand would be unavailing . . . will be sufficient to excuse proof of a demand.” *Crim v. Umbson*, 153 Cal. 697, [132 Am. St. Rep. 127, 103 Pac. 178], was a case where the great fire in San Francisco occurred shortly after the contract of purchase and sale was made, thus rendering it impossible, within the time designated in the contract, to exhibit a good title. It was held that the purchaser was entitled to rescind the contract and recover back part of the purchase money paid previous to the fire. (*Allen v. Globe Mining & Milling Co.*, 156 Cal. 286, [104 Pac. 305]; *Cabrera v. Payne*, 10 Cal. App. 675, [103 Pac. 176]; *Carter v. Fox*, 11 Cal. App. 67, [103 Pac. 910].) See, also, *Phelps v. Brown*, 95 Cal. 572, [30 Pac. 774], where the cases are reviewed. It is unnecessary to pursue the cases further to show that the rule stated in *Englander v. Rodgers*, 41 Cal. 420, is applicable only where neither the pleadings nor the evidence present an excuse for not making tender of the full purchase price.

The contract expressly provided that “if the title is found imperfect and cannot be perfected within ninety days from this date, this agreement shall be terminated and the deposit on it hereinafter mentioned returned.” Defendants’ right to retain the deposit was made to depend upon the vendee’s failing to make payment “upon the execution and delivery to him of a good and sufficient grant, bargain and sale deed conveying the undivided one-half of said property, with a good title free and clear of all encumbrances.”

The undisputed evidence was and the court so found that defendants were not only unable within the ninety days to

make such title but were not able to do so, if at all, until long after plaintiff had declared the contract at an end and had demanded payment of his deposit. And the court found that defendants could not, at any time between November 14, 1906, and March 28, 1910, convey a good title for reasons shown in the findings and that defendants knew all the facts relating to the defects in the title. It is true that, in his letter of February 13, 1907, plaintiff did not point out all of these defects but the defects not pointed out were well known by defendants to exist and to be of a character making it impossible until removed to pass a good title. Under these circumstances it would have been an idle act to notify defendants of these known defects, existing when the contract was made and which they undertook to remove within ninety days or return the deposit. We do not think that plaintiff lost his right to recover by not demanding the return of his money and declaring the contract at end until a few days after the expiration of the ninety days. Under the circumstances he would have been justified in so declaring even within that period since it was impossible to have made a good title within that time. (*Cabrera v. Payne*, 10 Cal. App. 675, [103 Pac. 176].)

Respondent contends that his letter of February 13, 1907, was a sufficient tender. Citing section 2074 of the Code of Civil Procedure, in *Peckham v. Stewart*, 97 Cal. 147, [31 Pac. 928], the court pointed out the change made by the Civil Code, section 1496, in the common-law rule as stated in *Englander v. Rodgers*, 41 Cal. 420, which required the production and offer of the money.

We do not think any tender other than was made was necessary and whether it was in fact sufficient need not be decided.

From any just view we can take of the case the judgment and order should be affirmed and it is so ordered.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on December 29, 1913.

[Civ. No. 1300. First Appellate District.—October 30, 1913.]

GUY E. DYAR, Appellant, v. JAMES B. STONE, Respondent.

BROKERS—COMMISSION FOR EXCHANGE OF PROPERTIES—WHEN NOT EARNED.—A broker who is employed to effect an exchange of real estate is not entitled to a commission if he does not produce a person ready and able to make an exchange in accordance with the proposed terms.

ID.—FAILURE TO EFFECT EXCHANGE—COMMISSION—BURDEN OF PROOF.—Where no exchange is effected, the burden of proof is upon the broker to show that he found one who was ready, willing, and able to effect the exchange upon the terms proposed.

APPEAL from a judgment of the Superior Court of Fresno County and from an order refusing a new trial. George E. Church, Judge.

The facts are stated in the opinion of the court.

Guy E. Dyar, *in pro per.*, for Appellant.

Walter J. Desmond, and Frank Kauke, for Respondent.

RICHARDS, J.—This is an action by a real estate broker to recover a commission alleged to be due upon an exchange of a ranch of the respondent, situated in Fresno County, for an apartment house of one Winifred M. Whitney located in Los Angeles. The transaction was never completed by an actual interchange of these properties.

The facts as developed at the trial were substantially these: The plaintiff in the year 1911 was a real estate broker in Fresno. The defendant, also residing in Fresno, was the owner of a large ranch near Raisin City, with respect to which said plaintiff undertook to negotiate an exchange for the Whitney apartment house in Los Angeles. After apparently proceeding some length with this effort he obtained from Stone a writing in the following words:

“FRESNO, CAL., August 17th, 1911.

“In the event that an exchange of my ranch of 647 acres near Raisin City for the Whitney apartment house in Los

Angeles, Cal., is consummated by me, I agree to pay Guy E. Dyar, as agent, a commission of 3% upon the value of my land in the trade (namely, \$25,000), it being understood that this commission is the total and only commission to be paid by me on said exchange of properties.

“J. B. STONE.”

Thereafter and on or about August 29, 1911, Stone went to Los Angeles, and was taken by a Mr. Boynton, the agent of Mrs. Whitney, to see her property. On September 25th Mrs. Whitney went with Boynton to Fresno to inspect the Stone Ranch. On the same day Stone made and signed a proposition for the exchange of properties, which proposition contained a number of conditions to be complied with by Mrs. Whitney, among which was the requirement that the proposition should be accepted within three days, and that within fifteen days thereafter the other specified conditions contained in the proposal should be complied with by her. On September 28th Mrs. Whitney indorsed her acceptance of the proposition upon it; and on the following day Stone placed in escrow with the Title Insurance & Trust Company of Los Angeles the money and documents required for the carrying into effect of said proposition on his part, expressly directing that his money and documents were to be returned to him if the escrow was not complied with and the transaction completed within fifteen days.

The undisputed evidence in the case shows that the full fifteen days' time elapsed without any effort being made on the part of Mrs. Whitney to comply with the escrow or conform to the conditions of the proposition of Stone to be by her performed, and that thereupon Stone withdrew from the transaction and refused to go ahead with the deal. Dyar then demanded payment in full of his commission, which being refused he brought this action.

The foregoing facts were all presented by the plaintiff at the trial as the basis and foundation of his claim. The defendant offered no evidence on his part. The court gave judgment for the defendant upon the foregoing admitted facts. The plaintiff moved for a new trial, which being denied, he now appeals from the judgment and order denying his motion for a new trial.

From the foregoing facts it will clearly appear that the judgment of the lower court must be affirmed.

Conceding it to be the law that a real estate broker has earned his commission under the ordinary agency contract when he had produced a person ready and able and willing to make the purchase or exchange of the property mentioned in his contract in accordance with its terms, and who enters into a valid and binding agreement for such purchase or exchange, the undisputed evidence in this case shows that the plaintiff did not produce such a person. The evidence nowhere shows, either expressly or by any reasonably adequate implication, either that Mrs. Whitney had such title to the property offered in this exchange as would enable her to make it; or that even if she had such title she was able otherwise to comply with the requirements of Stone's proposition. On the contrary, it affirmatively appears from the testimony given by her own agent Boynton that "We offered part performance and made an effort to give complete performance. We did not tender all we were obliged to tender within the time limited and were unable to comply with it within that time."

This testimony is not only uncontradicted, but the record also shows that no offer of full performance of the terms of respondent's proposition was ever made, or that Mrs. Whitney was able or ready at any time to make the same. It further appears that the principals to the proposed exchange of property never met.

This statement of the facts of this case brings it clearly within the rule announced in the case of *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, [107 Pac. 622], that where no exchange is effected the burden of proof is upon the broker to show that he found one who was ready and willing and able to effect the exchange upon the terms proposed. In that case the court held that the broker had not measured up to this requirement in his proof, and reversed the judgment upon that ground. There was some discussion in the main opinion in the above case as to the meaning to be given to the word "consummated" in a broker's agreement; but since the meaning to be given to that term was not essential to a determination of that case, and is not essential to a determination of the present case; and since also the judges in that case were not agreed as to what the meaning of that term should be,

the views upon that subject expressed in the main opinion therein are of no aid to appellant in the case at bar.

The judgment and order are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 449. First Appellate District.—October 31, 1913.]

THE PEOPLE, Respondent, v. ANTONE MANCUSO,
Appellant.

CRIMINAL LAW—RAPE—PROOF OF SERIES OF ACTS—ELECTION BY PROSECUTION.—In prosecutions for rape, where a single act is charged and a series of acts of intercourse are proved, the prosecution must select the particular act relied upon.

ID.—ELECTION—WAIVER BY ACCUSED.—But if a specific act of intercourse is alleged by the information, and proof of that act with many others is made, no objection being made to any of the testimony, and the defendant making no complaint that he is in doubt as to which act is the basis of the prosecution, his right to a more definite selection of the principal act will be deemed waived.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—REFERENCE TO PRIOR IMPRISONMENT.—Misconduct of the district attorney in bringing out on cross-examination of the wife of the defendant that he has served a term in jail is not prejudicial, when a statement to the same effect has already inadvertently crept into the case.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—WHEN NOT REVIEWABLE ON APPEAL.—Misconduct of the district attorney will not be considered on appeal, if no assignment of misconduct is made at the time nor request made for the court to instruct the jury to disregard it.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—EFFECT OF ADMONITION TO JURY.—Misconduct of the district attorney in his argument to the jury in observing that he cannot go fully into defendant's story of the case on cross-examination because of his very meager direct examination, is not prejudicial, if the court, upon objection, immediately directs the jury to disregard the comment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

James F. Johnson, and George S. Barkley, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was convicted upon a charge of rape upon the person of a child under the age of consent. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

It is true, as asserted by the defendant, that in prosecutions for rape, where a single act is charged and a series of acts of sexual intercourse are proved, the prosecution must select the particular act relied upon. (*People v. Castro*, 133 Cal. 11, [65 Pac. 13].) But in the present case a specific act was alleged in the information, and that act with a great many others was proved. No objection was made to any of this testimony, nor did the defendant complain at any time during the trial that he was in doubt as to which act of sexual intercourse was the basis of the prosecution. Apparently the district attorney relied particularly on the act alleged; but in any event the defendant, in view of the condition of the record, must be deemed to have waived any right he may have had to a more definite selection of the principal act.

Complaint is also made that the district attorney was guilty of misconduct in two instances. The first arose when the district attorney brought out on the cross-examination of the defendant's wife that the defendant had served a term of imprisonment in the county jail. That error on the part of the district attorney could not have injured the defendant for the reason that a statement to the same effect had inadvertently crept into the case prior to the time when the question now complained about was asked. Moreover, no assignment of misconduct was made at the time, nor was the court requested to instruct the jury to disregard the objectionable question. Therefore the possibility of injury resulting to the defendant in consequence of that question cannot now be considered. (*People v. Walker*, 15 Cal. App. 400, [114 Pac. 1009].)

The second act of misconduct to which objection is made occurred during the argument to the jury by the district attorney, when he observed in effect that he could not go fully into defendant's story of the case on cross-examination be-

cause of his very meager direct examination. Assuming that the representative of the people in this connection overstepped the strict legal rights of the defendant, the court immediately, upon objection, directed the jury to disregard the comment, which admonition we will presume the jury obeyed, (*People v. Overacker*, 15 Cal. App. 620, [115 Pac. 756]), and that no injury resulted to the defendant.

The defendant finally asserts that the court committed prejudicial error by modifying a certain instruction to the jury offered by him. The same instruction with the identical modification was given in the case of *People v. Von Perhacs*, 20 Cal. App. 48, [123 Pac. 1048]; and there it was held, as we hold again in this case, that the action of the court is not subject to any just criticism.

This disposes of all the points raised by the defendant.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Crim. No. 432. First Appellate District.—November 3, 1913.]

THE PEOPLE, Respondent, v. ONG GIT, Appellant.

CRIMINAL LAW—NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.—Newly discovered evidence whose only tendency is to contradict and impeach the testimony of a witness for the prosecution neither warrants nor requires the granting of a new trial.

ID.—CRIMINAL TRIAL—GROUNDS FOR EXCLUSION OF PERSON FROM COURTROOM.—The fact that a person has been guilty of misconduct at the preliminary examination of one accused of murder, in coaching and signaling witnesses for the prosecution, is not a valid ground for his exclusion from the courtroom at the trial of the accused in the superior court; if counsel for the defendant claims that such person has coached witnesses for the prosecution, and that his presence at the trial will intimidate witnesses for the defense, then counsel should develop these facts by cross-examination or independent proof, and not rely on mere assertions, otherwise the court does not abuse its discretion in refusing to exclude such person from the trial.

ID.—EXCLUSION OF WITNESS—REASONS FOR RULE.—The purpose of the rule permitting the exclusion of witnesses from the courtroom upon the request of either party is to prevent them from hearing

the testimony of a witness under examination. Strictly construed, the rule applies only to a witness of the party adverse to the party making the request; liberally construed, it applies to a witness who, in good faith, has been subpoenaed to testify for either party to the action.

ID.—EXCLUSION OF WITNESS—DISCRETION OF COURT.—The exclusion of a witness is not a matter of absolute right in every case. A request therefor is addressed to the discretion of the trial judge, the exercise of which must be controlled largely by the circumstances of the individual case; and the court does not abuse its discretion in refusing to exclude a person who appears to have been subpoenaed by the defense to lay a foundation for his exclusion.

ID.—INTERPRETER—COMPETENCY—HOW QUESTIONED AND DETERMINED.—Where the competency of a Chinese interpreter and the accuracy of his interpretation of testimony at the preliminary examination are questioned at the trial of the accused, testimony, by cross-examination or otherwise, may be elicited to show his lack of ability or accuracy in translation, but the court may properly refuse the request of the accused that the interpreter hold a conversation in the Chinese language with Chinese witnesses in the presence of the jury to determine his qualifications.

ID.—WITNESS—IMPEACHMENT BY TRANSCRIPT OF EVIDENCE AT INQUEST—INTERPRETER.—The court may properly refuse to permit the accused to show, by a transcript of the testimony taken at the coroner's inquest, that two of the witnesses for the prosecution there made statements irreconcilable with their testimony at the trial, when the testimony at the inquest was given through an interpreter, and he is not produced to prove the correctness of the transcript.

ID.—HOMICIDE—DEGREE OF OFFENSE—INSTRUCTIONS.—Where the only defense interposed in a homicide case is that the defendant is not the person who fired the fatal shots, and the evidence is such as to compel the jury either to find the defendant guilty of an offense greater than manslaughter or acquit him, the court is not required to instruct on the subject of manslaughter.

ID.—INSTRUCTIONS—REFUSAL BECAUSE COVERED BY CHARGE OF COURT.—The refusal of instructions requested by the defendant is proper where they are covered by the charge of the court.

ID.—HOMICIDE—PROOF OF CORPUS DELICTI.—The evidence shows that the deceased in this case was killed by a gunshot wound inflicted by the defendant; an autopsy upon the body was not necessary to the establishment of the *corpus delicti*.

ID.—REMARKS OF COUNSEL—ADMONITION TO JURY.—Where the trial court admonishes the jury to pay no heed to remarks of the district attorney, it will be presumed on appeal that the admonition was observed.

ID.—MISCONDUCT OF COUNSEL—TIME FOR ADMONITION.—Ordinarily it is better practice to correct an abuse occurring in argument to the jury at the moment of its occurrence, but it was not prejudicial error in this prosecution for homicide for the court to refuse to entertain further exceptions while the argument of the district attorney was in progress, and direct counsel for the defendant to note and assign as misconduct any remark which they deemed objectionable and prejudicial at the close of the argument; counsel complying with the ruling, and the court then admonishing the jury at the close of the argument that "the arguments of counsel are of value to you in your deliberations only in so far as they are based upon the testimony that has been given to you by the witnesses upon the stand. Any outside matters that may have been brought into the case by counsel or any of them have no bearing, and should have no weight with you."

ID.—HOMICIDE—EVIDENCE AS TO IDENTITY OF ACCUSED.—PHOTOGRAPHS.—Where the defense in cross-examination of a witness for the people in a homicide case endeavors to show that shortly after the commission of the crime the witness was uncertain in his identification of the accused, he may testify on redirect examination that a short time after the offense was committed he was shown a photograph of a group of Chinamen and therein recognized and identified the accused.

APPEAL from a judgment of the Superior Court of Monterey County and from an order refusing a new trial. B. V. Sargent, Judge.

The facts are stated in the opinion of the court.

Carroll Cook, and Wm. Hoff Cook, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

LENNON, P. J.—The defendant, Ong Git, and three other Chinamen were jointly charged with the murder of one Lee Lung Kai. Upon a separate trial of the defendant Ong Git he was found guilty of murder in the first degree, and his punishment was fixed at life imprisonment. This appeal is from the judgment and an order denying a new trial.

The motion for a new trial was grounded, among other things, upon alleged newly discovered evidence which, as shown by affidavits and the testimony of witnesses offered and received in support of the motion, tended to contradict and

impeach the evidence of one McKeever, a witness for the people; who testified upon the trial that he had heard the shots which it was claimed resulted in the death of the deceased, and that shortly thereafter he had seen the defendant with a pistol in his hand running away from the scene of the homicide. In short, the newly discovered evidence consisted, as stated in the opening brief of counsel for the defendant, "in part of contradictions of statements by McKeever as to what he had done, and in part of direct and affirmative evidence that the witness McKeever was in another place in Salinas at the time when, according to his testimony, he was in Chinatown and saw the defendant."

Aside from the question as to whether or not the affidavits filed in support of the motion show that the evidence relied upon for a new trial could not with due diligence have been discovered and produced in the first instance, we are satisfied that the showing as made was insufficient to warrant the granting of a new trial upon the ground of newly discovered evidence. Admittedly the only tendency of the newly discovered evidence was to contradict and impeach the testimony of the witness McKeever; and it is well settled that such evidence neither warrants nor requires the granting of a new trial. (*People v. Anthony*, 56 Cal. 397; *People v. McCurdy*, 68 Cal. 576, [10 Pac. 207]; *People v. Goldenson*, 76 Cal. 328, [19 Pac. 161]; *People v. Loui Tung*, 90 Cal. 377, [27 Pac. 295]; *People v. Freeman*, 92 Cal. 359, [28 Pac. 261]; *People v. Holmes*, 126 Cal. 462, [58 Pac. 917].)

We are unable to perceive how defendant was prejudiced by the refusal of the lower court to grant the request of counsel for the defendant that a Chinaman named Wong Duck be excluded from the courtroom. The district attorney in effect declared that the assistance of this particular Chinaman was needed for the proper presentation of the prosecution's case. On the other hand it appears that the defense desired his exclusion from the courtroom not upon the ground that he was to be a witness in the case, but because, as it was claimed, he had coached some of the witnesses for the prosecution, and was caught openly signaling to them during the preliminary examination in the justice's court. It was further claimed by counsel for the defendant that the mere presence of this Chinaman in the courtroom would operate to intimidate certain Chinese witnesses who would be called to identify the

defendant as one of the persons who participated in the homicide, and tend to coerce them into giving false testimony. These contentions were supported in the lower court only by the vehement assertions of counsel for the defendant, and were as vehemently disputed by the district attorney. Conceding, however, that the Chinaman in question had been guilty of the misconduct ascribed to him at the preliminary examination of the defendant, this in itself would not have constituted a valid ground for his exclusion from the trial of the defendant in the superior court. That was a matter which should have been called to the attention of and remedied by the justice of the peace who presided at the preliminary examination. If it were true, as counsel for the defendant claimed, that certain of the witnesses for the prosecution had been coached by the Chinaman in question to give false testimony, that was a fact which might have been developed to the advantage of the defendant upon cross-examination of the suspected witnesses, or by independent proof with such cross-examination as a foundation therefor, but such fact, even if it were established, would not in and of itself be sufficient to compel the making of the order of exclusion. If counsel for the defendant really believed that the presence in the courtroom of the Chinaman in question would result in the intimidation of certain witnesses then a showing to that effect should have been made by more effective means than mere assertion. Doubtless if a proper and sufficient showing of the likelihood of such intimidation had been made the trial court, in the exercise of its discretion, would have made and enforced an order which would have covered the situation.

But apart from all of this the purpose of the rule permitting the exclusion of witnesses from the courtroom upon the request of either party to an action, civil or criminal, is to prevent such persons from hearing the testimony of a witness under examination. Strictly construed the rule has application only to a witness of the party adverse to the party making the request (Code Civ. Proc., sec. 2043). Liberally construed it doubtless can and should be applied to a hostile witness who, in good faith, has been subpoenaed to testify for either party to the action. The exclusion of a witness, however, is not a matter of absolute right in every case. A request for such exclusion is addressed to the discretion of the trial judge,

the exercise of which must be controlled largely by the circumstances of the individual case. (*People v. Garnett*, 29 Cal. 622; *People v. Sam Lung*, 70 Cal. 515, [11 Pac. 673].) In the present case the Chinaman in question was neither subpoenaed nor called as a witness for the people; and all of the circumstances surrounding the request for his exclusion justify the inference that such exclusion was not desired upon the ground that he was to be a witness in the case on either side, but rather because he might be of some assistance to the prosecution in the presentation of its case.

In other words, we are satisfied that the trial court was justified in assuming, as evidently it did, from the statements and tacit admissions of counsel for the defense, that although the Chinaman in question was subpoenaed ostensibly as a witness for the defense, he was in fact placed under the process of the court merely for the purpose of laying the foundation for the request that he be excluded from the courtroom. Obviously, therefore, the mere fact that he had been formally subpoenaed as a witness for the defense was not conclusive nor even a matter of any moment in the consideration and determination of the request.

The record before us does not support counsel for the defendant in the claim that they were denied the right to cross-examine Lee Hing, a witness for the people, as to his intimacy and conversations with Wong Duck, the Chinaman whose exclusion from the courtroom was requested. To the contrary the record shows that counsel for the defense, despite repeated objections and adverse rulings relating to the form and repetition of various questions, persisted in the cross-examination of this witness, and eventually succeeded in securing negative answers to every material and relevant question that was asked him.

Robert L. Jones, a Chinese interpreter, was called and sworn as a witness for the defense, and testified that he had correctly translated the testimony given by the several witnesses at the preliminary examination from the Chinese into the English language. The purpose of this testimony was not definitely disclosed in the lower court; but apparently it was intended as a foundation for the subsequent introduction in evidence by way of impeachment of contradictory statements appearing in the transcript of the testimony taken at the

preliminary examination. However that may be, upon cross-examination of Jones, the interpreter, counsel for the people endeavored to show that the witness did not understand the different dialects of the several Chinese witnesses who had testified at the preliminary examination; and with the purpose of offsetting any unfavorable inference which may have resulted from such cross-examination, counsel for the defendant requested that two of the Chinese witnesses who had been previously sworn in the case be permitted, in the presence of the jury, to converse in Chinese with the witness under examination, and thereby enable the latter to demonstrate his qualifications as an interpreter of the Chinese language. The trial court promptly and properly denied the request.

It may be conceded that the accuracy of an interpreter's translation of testimony is a question of fact which must ultimately be determined by the jury. (*Skaggs v. State*, 108 Ind. 53, [8 N. E. 695]; *Schnier v. People*, 23 Ill. 11; *United States v. Gibert*, 25 Fed. Cas. No. 15204; *Thon v. Rochester R. R. Co.*, 83 Hun, 443, [30 N. Y. Supp. 621]; Wharton on Criminal Evidence, sec. 4497.) It follows that if the competency of the witness to interpret the Chinese language was assailed, or doubt thrown upon the accuracy of his translation, by cross-examination or otherwise, the defendant undoubtedly had the right to show, if he could, either upon redirect examination or by competent independent evidence, that the interpreter was not only lacking in ability to translate from the Chinese into the English language, but that his translation of the testimony given at the preliminary examination was not correct. This must be so, because the interpreter was nothing more nor less than a witness to the claimed contradictory statements sought to be introduced in evidence by way of impeachment (*People v. Lem Deo*, 132 Cal. 199, [64 Pac. 265]), and obviously the truth of his testimony might have been impaired or wholly impeached by the methods usually employed and sanctioned to discredit the testimony of an ordinary witness. Manifestly the situation could not be met by the obvious absurdity which would be certain to result from the jabbering jargon of an unbridled oriental tongue endeavoring to demonstrate to an American jury a Caucasian's knowledge of the Chinese language.

The defendant offered in evidence a transcript of the testimony taken at the coroner's inquest, for the purpose of impeaching two of the witnesses for the prosecution. It was claimed that such transcript would show that the assailed witnesses had made previous statements which were contradictory of and wholly irreconcilable with their testimony on the trial—which was to the effect that they were present at the homicide, and identified the defendant as one of four Chinamen who participated in the perpetration of the crime. It appears that the testimony taken at the coroner's inquest was given through the medium of an interpreter; and for that reason the prosecution objected to the transcript as containing incompetent evidence, unless it first were shown by the testimony of the interpreter who officiated at the inquest that the statements attributed to the witnesses referred to were correct. Counsel for the defendant were either unwilling or unable to produce the interpreter as a witness; at any rate the interpreter immediately in question was not produced as a witness, and accordingly the objection was sustained upon the ground stated.

We see no error in the ruling. In order to lay the foundation for the impeachment of the assailed witnesses it was first necessary to prove that they had made the contradictory statements attributed to them; and this could be done only by "the interpreter or some other witness who had heard and understood the language in which the statements . . . were made." (*People v. Ah Yute*, 56 Cal. 119.) Without such proof the reception in evidence of the statements attributed to the witness and alleged to have been made at the coroner's inquest would have been a transgression of the rule of evidence which excludes hearsay testimony. (*People v. Lee Fat*, 54 Cal. 527; *People v. Ah Yute*, 56 Cal. 119; *People v. Jan John*, 137 Cal. 220, [69 Pac. 1063]; *People v. Lewandowski*, 143 Cal. 574, [77 Pac. 467]; *People v. Jan John*, 144 Cal. 285, [77 Pac. 950].)

The defendant's requested instructions dealing with the definition of manslaughter, and in effect calling for a conviction of such offense if the killing was shown to have been "committed without malice and in a sudden quarrel or heat of passion," were rightfully refused by the trial court because they had no possible application to the facts of

the case as developed upon the trial. The evidence adduced upon behalf of the people not only tended to, but did show the commission of a willful, deliberate, and malicious murder. On the other hand, the defense interposed by the defendant rested entirely upon the theory that the defendant was not the person who fired the fatal shots; and in support of this theory counsel for the defendant endeavored to show, by cross-examination and otherwise, merely that certain witnesses for the people were either mistaken or willfully false in their identification of the defendant as one of the perpetrators of the crime. It was not claimed by the defendant in the court below, nor is it pretended here, that the circumstances attending the killing as revealed by the evidence upon the whole case contained the slightest suggestion of a sudden quarrel or embodied any of the essentials of manslaughter.

We are satisfied from a careful perusal of the record before us that the evidence on the whole case compelled the jury either to find the defendant guilty of an offense of greater magnitude than manslaughter, or else acquit him. This being so, the trial court was not required to charge the jury upon the subject of manslaughter. (*People v. Madden*, 76 Cal. 521, [18 Pac. 402]; *People v. Barry*, 90 Cal. 41, [27 Pac. 62]; *People v. Scott*, 93 Cal. 513, [29 Pac. 123]; *People v. McNutt*, 93 Cal. 658, [29 Pac. 243]; *People v. Lopez*, 135 Cal. 23, [66 Pac. 965]; *People v. Swist*, 133 Cal. 520, [69 Pac. 223]; *People v. Keith*, 141 Cal. 686 [75 Pac. 304]; *Courteney v. Standard Box Co.*, 16 Cal. App. 600, [117 Pac. 778].)

Complaint is made of the trial court's refusal to give certain other instructions requested by the defendant; but we find upon an inspection of the record that in each instance the subject matter of the requested instruction, in so far as it correctly stated the law, was sufficiently and clearly covered in the charge of the court, which in its entirety and without conflict stated to the jury the law applicable to the facts of the case.

There is no merit in the contention that the *corpus delicti* was not established at the trial in the court below. We have neither the time nor the inclination to discuss the hypercritical analysis made of the evidence upon this phase of the case by counsel for the defendant. It will suffice to say that the record reveals competent, complete, and uncontroverted evidence

that the victim of the crime was dead, and that he died as the immediate result of a gunshot wound inflicted by the defendant. An autopsy upon the body of the deceased was not necessary to the establishment of the *corpus delicti*. (*People v. Wood*, 145 Cal. 659, [79 Pac. 367].)

Counsel for defendant took exception to several remarks made during the argument to the jury by special counsel who was employed to assist the district attorney, and assigns such remarks as prejudicial misconduct. We fail to see how in any specified instance the rights of the defendant were impaired by the remarks complained of. In any event the trial court in each instance admonished the jury to pay no heed to such remarks; and presumably the admonition was observed.

Finally, during the course of the argument the trial court of its own motion ruled that no further exceptions would be entertained while the argument was in progress, and directed counsel for the defendant to note and assign as misconduct any remark which they deemed objectionable and prejudicial at the close of the argument.

Ordinarily it is better practice, no doubt, to correct an abuse occurring in argument to the jury at the moment the incident occurs. In the present case, however, the procedure followed apparently became necessary because of frequent and, in many cases, unwarranted interruptions of the argument; and such ruling, while expediting the progress of the trial, neither hampered nor harmed the defendant. Counsel for the defendant complied with the ruling of the court, and at the close of the argument specified several instances in which it was claimed that the prosecuting officers had misstated the evidence; but the trial court in its charge to the jury covered the situation, we think, by admonishing the jury that "The arguments of counsel are of value to you in your deliberations only in so far as they are based upon the testimony that has been given to you by the witnesses upon the stand. . . . Any outside matters that may have been brought into the case by . . . counsel or any of them . . . have no bearing, and should have no weight with you."

Certain exhibits, consisting of two photographs of a group of Chinamen, which included the defendant, were properly admitted in evidence for the purpose stated by the district

attorney. The occasion for the offer and admission in evidence of these exhibits arose after counsel for the defendant had endeavored to show upon cross-examination that shortly after the commission of the homicide Lee Hing, a witness for the people, was uncertain in his identification of the defendant as one of the guilty parties. Upon redirect examination the witness testified that shortly after the commission of the homicide he was shown the exhibits in question by the district attorney, and thereupon recognized and identified the defendant as one of the persons who had participated in the killing of the deceased. The purpose of this testimony and of the exhibits accompanying it was, as in effect stated by the district attorney, to rebut any unfavorable inference which might have resulted from the cross-examination, by showing that the witness, with the aid of such exhibits, could and did with certainty implicate and identify the defendant shortly after the commission of the crime. With that purpose in view and for that purpose alone the exhibits in question were properly admitted in evidence. (*People v. Ferrara*, 18 Cal. App. 271, [122 Pac. 1089].)

There was no prejudicial error in permitting the witness Shannon to testify to all that was said by the several parties present upon the occasion when the defendant, Ong Git, and his codefendants were arrested. True Shannon could not testify positively that the defendant in the case at bar was present on the occasion referred to; but this fact was subsequently established by competent evidence.

Having discussed and disposed of all the points presented upon this appeal which are worthy of mention, and it appearing that the defendant was fairly tried and justly convicted, the judgment and order appealed from are affirmed.

It is but fair to add that at the trial the defendant was represented by counsel other than those appearing for him upon the appeal.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1280. First Appellate District.—November 5, 1913.]

SARAH E. MOORE, Respondent, v. **MARY E. GILSON**,
and **MARY E. GILSON**, as Executrix of the Will of
Rufus K. Gilson, Deceased, Appellant.

APPEAL—REVIEW OF CONFLICTING EVIDENCE IN SUIT TO QUIET TITLE.—

Where the evidence in a suit to quiet title is conflicting as to whether a deed was intended to be delivered, and also as to whether it was intended merely as a mortgage, the findings of the jury will not be interfered with on appeal.

ID.—STATEMENT OF CASE—ASSIGNMENT OF ERROR AS TO INSTRUCTIONS.—

Where the transcript on appeal discloses that the instructions of the court have not been embodied in the statement of the case, and that no specification of error in the giving of instructions has been made in the statement, the argument of the appellant as to error in such instructions cannot be considered by the appellate court.

APPEAL from a judgment of the Superior Court of Santa Cruz County and from an order refusing a new trial. **Lucas F. Smith**, Judge.

The facts are stated in the opinion of the court.

David C. Clark, and **Carl E. Lindsay**, for Appellant.

Benj. K. Knight, for Respondent.

RICHARDS, J.—This is an action to quiet title to a lot in the city of Santa Cruz. The complaint is in the usual form. The defendants appeared by answer, denying title in the plaintiff, and also by cross-complaint, setting up title in decedent **Rufus K. Gilson** at the time of his death.

Upon the trial the plaintiff presented a deed of the lot in question from said **Gilson** to her, executed and claimed by her to have been delivered prior to his death. With respect to the execution of this deed there is no dispute; but with respect to its delivery, and the intention of the defendant **Gilson**, at the time he handed it to the plaintiff, as to whether it was to pass from his control; or, as to whether it was intended to be merely a mortgage for money due by him to the plaintiff, the evidence is clearly conflicting. The jury resolved these sub-

stantial conflicts in the evidence in favor of the plaintiff, and with its discretion in that respect it is not our province to interfere.

The appellants further contend that certain instructions said to have been given by the court to the jury are erroneous in the respects pointed out in the briefs of their counsel. The transcript discloses that the instructions of the court were not embodied in the statement of the case; and further discloses that no specification of error on the part of the court in giving any of its instructions was therein made. For each of these reasons the argument of counsel for the appellants as to said erroneous instructions cannot be considered upon this appeal. (*Paris v. Raynor*, 76 Cal. 647, [18 Pac. 788]; *Matthews v. Jones*, 92 Cal. 563, [28 Pac. 597]; *Braverman v. Fresno C. & I. Co.*, 101 Cal. 644, [36 Pac. 386]; *Southern Pacific Co. v. Superior Court*, 105 Cal. 84, [38 Pac. 627]; *Kelly v. Ning Yung Ben. Assoc.*, 2 Cal. App. 460, [84 Pac. 321].)

No error appearing in the record the judgment and order denying the defendants' motion for a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1213. First Appellate District.—November 6, 1913.]

J. N. KOWALSKY et al., Appellants, v. ESTELLA NICHOLSON, Respondent.

JUDGMENT—INCORRECT ENTRY—AMENDMENT NUNC PRO TUNC.—In a case where it is made to appear that the entry in the minutes does not correctly embody the judgment given by the court, it is a familiar rule that the court may at any time amend the judgment *nunc pro tunc* to make the entry conform to the true judgment.

ID.—AMENDMENT OF ORDER INADVERTENTLY MADE AND ENTERED.—The power of courts to amend their judgments is not wholly confined to such cases; it extends also to cases where, as here, the order was inadvertently made and entered.

ID.—REPLEVIN—CORRECTION OF JUDGMENT NUNC PRO TUNC.—Where the plaintiff in claim and delivery has secured possession of the property, and the defendant obtains a dismissal of the action

for want of prosecution, the order of dismissal, if it inadvertently omits to direct the return of the property, may be corrected by the court *nunc pro tunc*.

APPEAL from an order of the Superior Court of the City and County of San Francisco amending an order dismissing an action for want of prosecution. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

Edward Lande, for Appellants.

Arthur H. Barendt, for Respondent.

KERRIGAN, J.—This is an appeal from an order entered *nunc pro tunc* amending a previous order dismissing an action for lack of prosecution.

The action was in claim and delivery under proceedings in which the plaintiffs had secured possession of the property described in the complaint. After the cause had been at issue for nearly four years the court, upon notice to the plaintiffs, granted defendant's motion to dismiss the same for want of prosecution. Subsequently the court, upon due notice to the plaintiffs, amended its order of dismissal *nunc pro tunc* as of the date of its original entry by adding the following: "And the defendant is entitled to have returned to her all the property taken from her under the previous proceeding of this action of replevin, or if return thereof cannot be had, then she shall have judgment for the value thereof in the sum of \$1,000.00 and for the delivery to her of the undertaking in this matter."

The record does not show that the original entry as made by the clerk was different from the one directed by the court; and plaintiffs therefore contend that the court had no power to change the order or judgment, nor, in changing it, to direct that it be entered *nunc pro tunc*.

In a case where it is made to appear that the entry in the minutes does not correctly embody the judgment given by the court it is a familiar rule that the court may at any time amend the judgment *nunc pro tunc* to make the entry conform to the true judgment. (*Morrison v. Dapman*, 3 Cal.

255, 257; *Cowdery v. London & S. F. Bank*, 139 Cal. 298, [96 Am. St. Rep. 115, 73 Pac. 196].) And in this state the power of the courts to amend their judgments is not wholly confined to such cases. It extends also to cases where, as here, the order was inadvertently made and entered. This is not a case like the *Estate of Potter*, 141 Cal. 424, [75 Pac. 850], where, upon dismissal, the court might have directed different forms of judgment to be entered. Here the defendant being entitled to a dismissal of the action, as the court correctly held, it followed under the circumstances disclosed by the record that the judgment should, as a matter of course, have directed the return to her of the property taken. Its failure to do so, it clearly appears, was merely an inadvertence or mistake, and not a judicial error.

In the *Estate of Schroeder*, 46 Cal. 304, a personal judgment was rendered against the administrator; and it appeared from the record that the judgment ought to have been made payable in due course of administration. It was held that this was such an error or mistake as the court could correct. To the same effect see *Bostwick v. McEvoy*, 62 Cal. 496.

In the *Estate of Willard*, 139 Cal. 501, 504, [64 L. R. A. 554, 73 Pac. 240], an allowance was made to a broker instead of to the administrator as prayed for; and it was held that the court had power on motion to set aside the void allowance, to amend the decree by striking out the allowance as made, and to insert therein in place thereof an allowance to the administrator, so as to properly dispose of the issue presented by the petition and effectuate the intention of the court. In other words, the error was not such as could only be remedied by a motion for a new trial.

In the case of *Leviston v. Swan*, 33 Cal. 480, 484, a judgment in foreclosure did not provide that any one was personally liable for a deficiency, and should be bound therefor after a sale of the property. More than three years subsequently an order of the court was entered, directing the docketing of a judgment for the deficiency. This order was affirmed, the supreme court saying: "The judgment in this case, as first entered, was defective in not designating the defendants who were personally liable for the debt; but inasmuch as the record shows who they were, the court had the power to amend the judgment at any time by adding a clause

designating the defendants who were personally liable. The more regular motion would have been to amend the judgment by supplying the omission which was apparent upon the face of the record, but we consider the course pursued as amounting substantially to the same thing." (See, also, *MacNeil v. Ward*, 2 Cal. Unrep. 174, [11 Pac. Coast Law Journal 224]; Freeman on Judgments, vol. 1, sec. 70, p. 93.)

In Texas the "courts may at any time add to their judgments such clauses as may be necessary to carry them into effect when there is anything in the judgment by which to amend." In New York, when the amendment calls for the insertion of what would have been granted "as a matter of course" in the first instance, the cases hold that the judgment may be corrected. (Freeman on Judgments, vol. 1, sec. 70, pp. 93, 95.)

In the case of *Wiggin v. Superior Court*, 68 Cal. 398, 402, [9 Pac. 646, 648], the court set aside a decree of final distribution which it had the day before granted, on the ground that the discharge of the administrator provided for therein had been inadvertently made. Upon appeal it was held that the lower court had jurisdiction to vacate the order of final discharge, it having been made inadvertently, and the motion for that purpose being made within a reasonable time. The court said: "To illustrate, suppose a judgment is taken upon a default prematurely entered, or a judgment is inadvertently entered in favor of defendant where it was intended to be in favor of plaintiff, or that for any one of a hundred reasons which might be supposed the court has accidentally or inadvertently entered orders or decrees not in consonance with its judgment or the law, and from which rank injustice must follow, can it be contended that the court has no power . . . to correct the error, and that the injured party must be remitted to an appeal for remedy? We think not."

Upon the dismissal of the action in the case at bar defendant was entitled to the return of the property involved in the action; and a failure to enter the requested correction of the judgment would be equivalent apparently to a judgment in favor of the plaintiffs on the merits of the case. This would be manifestly unjust; and as the record shows that defendant was entitled to judgment as finally entered, and as the motion

to correct the mistake was promptly made, the action of the court in the premises must be sustained.

Of course, the defendant being entitled to have the judgment corrected, was entitled to have it corrected *nunc pro tunc* as of the date of its original entry. (Freeman on Judgments, vol. 1, sec. 74, p. 104.)

The order appealed from is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on January 5, 1914.

[Civ. No. 1235. First Appellate District.—November 6, 1913.]

B. & W. ENGINEERING COMPANY (a Corporation), Appellant, v. **SARAH C. BEAM**, as Executrix of the Will of **Isaiah Willard Beam**, Deceased, et al., Defendants and Respondents; **JOHN DOE** et al., Defendants.

ACCORD AND SATISFACTION—SUFFICIENCY OF EVIDENCE TO ESTABLISH IN ACTION TO RECOVER FOR CLEARING A LOT.—In this action to recover a balance alleged to be due for clearing a lot, the evidence justifies a finding to the effect that the original claim of the plaintiff's assignor was extinguished by the execution of an accord and satisfaction.

ID.—DEFINITION AND EFFECT OF ACCORD AND SATISFACTION.—The phrase "accord and satisfaction," as it is known and applied in the law, means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. The effect of such agreement when executed is to extinguish the antecedent liability.

ID.—PRIOR CONTROVERSY—EXISTENCE OF BONA FIDE DISPUTE.—An agreement of accord and satisfaction presupposes a prior con-

trovery concerning the relative rights of the parties under the pre-existing agreement; and before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, the dispute must be shown to be *bona fide*; but it is not required, in order to validate an executed agreement of accord and satisfaction, that the circumstances of the transaction upon which it is founded should affirmatively show that there is room for an honest dispute.

ID.—FOUNDATION FOR DISPUTE—WHETHER ESSENTIAL TO SATISFACTION.

—If a debt or claim is disputed at the time of payment, the payment, when accepted, of a part of the whole debt is good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such case is, Was the dispute honest or fraudulent? If honest it affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction.

ID.—BONA FIDE DISPUTE—QUESTION OF FACT.—The question of the existence of a *bona fide* dispute is a question of fact to be determined by the trial court from all the circumstances of the transaction.

ID.—DETERMINATION OF QUESTION—IMMATERIAL CIRCUMSTANCES.—In the determination of that question the mere fact that it might have been held, in an action involving the construction of the original contract, that the plaintiff's assignor could not have been compelled to relinquish any portion of its original claim, was of no consequence in the face of the established fact that it did actually and knowingly accept a lesser amount in full satisfaction and settlement of its claim.

ID.—CONCLUSIVENESS OF SETTLEMENT—DETERMINATION OF WHICH PARTY WAS IN THE RIGHT.—Where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake have adjusted existing differences concerning their relative rights and obligations arising out of a valid pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made for the purpose of ascertaining which of the parties was right in the controversy which preceded and constituted the basis of such settlement.

ID.—GOOD FAITH OF DISPUTE—FINDINGS AND JUDGMENT.—Where the good faith of the dispute, which is expressly found to be the basis of an executed agreement of accord and satisfaction, follows as an irresistible inference from all the facts and circumstances of the case and the acts of the parties which are found by the trial court to have attended the execution of the agreement, the findings are not open to attack as not sustaining a judgment for the defendant on the plea of accord and satisfaction, although

they do not specifically and affirmatively determine that the dispute which preceded the payment of the claim in controversy was genuine and made in good faith.

ID.—COMPROMISE BY AGENT—RATIFICATION BY PRINCIPAL.—Where a principal accepts and retains money paid to his agent, with full knowledge that such payment was made, accepted, and receipted for upon the express condition that it was in full settlement of a disputed claim, the principal thereby ratifies the compromise and is estopped to deny the agent's authority to make it.

ID.—PART PERFORMANCE—WHETHER EXTINGUISHES OBLIGATION.—**SECTION 1524 OF CIVIL CODE.**—Section 1524 of the Civil Code providing that "part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation," has reference only to agreements of release and satisfaction made in cases where the obligation is neither doubtful nor disputed, and has no application to an executed agreement of accord and satisfaction founded upon the settlement and extinction of a disputed debt.

ID.—ACCORD WITHOUT SATISFACTION—WHETHER BARS DEBT.—An accord without satisfaction will not operate to bar an action upon a disputed debt.

ID.—PAROL EVIDENCE—WHETHER ADMISSIBLE TO PROVE PERFORMANCE. Parol evidence, even though it involves the subject matter of an executory contract which in itself would be within the statute of frauds, may be resorted to for the purpose of proving performance in satisfaction of the accord.

ID.—EXECUTED AGREEMENT—EFFECT TO EXTINGUISH ORIGINAL OBLIGATION.—Where an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished.

ID.—PLEADING—NECESSITY OF SPECIALLY PLEADING ACCORD AND SATISFACTION.—The settled rule of pleading in this state requires an agreement of accord and satisfaction to be specially pleaded before it can be availed of as a defense.

ID.—EXCEPTION TO RULE THAT ACCORD AND SATISFACTION IS TO BE SPECIALLY PLEADED.—This rule is subject to the exception that if a plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tend to show an accord and satisfaction, the defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer.

ID.—AMENDMENT OF ANSWER.—It is not an abuse of discretion to allow the defendant to amend his answer, at the close of the evi-

dence, by specially pleading the existence of an executed agreement of accord and satisfaction, where the evidence tends to show the existence of such an agreement.

ID.—PLEADING AND FACTS CONSTITUTING ACCORD AND SATISFACTION.—

The defense of accord and satisfaction, at the very best, requires nothing more to be pleaded than the payment and acceptance, upon a mutual agreement express or implied, of a certain sum of money or other thing of value in full settlement and satisfaction of a pre-existing and previously disputed obligation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

William P. Hubbard, for Appellant.

Myrick & Deering, and James Walter Scott, for Respondents.

LENNON, P. J.—The cause of action sued on herein was assigned to the corporation plaintiff by a pre-existing copartnership of the same name. The plaintiff sought to recover from the defendants the balance of a sum of money alleged to be due upon a contract entered into between plaintiff's assignor, the B. & W. Engineering Company, and I. Willard Beam, wherein the latter acted for himself and as the representative of the defendant W. Jessup & Sons, Limited. Upon the death of Beam his widow was appointed as executrix of his last will and testament, and in due time a claim, founded upon the contract in suit, was presented to and rejected by her as such executrix. Said contract consisted of a proposal in writing by plaintiff's assignor which was accepted in writing by Beam, the deceased, for himself and the defendant W. Jessup & Sons, Limited. By the terms of the contract plaintiff's assignor contracted to clear a certain lot of land for the actual cost of the work plus fifteen per cent commission thereon. The contract in question when proposed and as finally accepted contained this clause: "We wish to state . . . that our estimated figure is one thousand dollars for clearing this lot. . . ."

The action was defended in part upon the theory that the sum claimed by plaintiff's assignor to be due for and on account of the actual cost of clearing the lot in question exceeded the sum specified therefor in the contract by \$411.86, and that such excess in part covered and called for the cost of additional and unauthorized work and labor. The action was further defended upon the ground specifically pleaded in an amended answer that plaintiff's assignor had accepted the sum of one thousand and seventy dollars in full settlement and extinction of the obligation sued upon.

Upon the general issue covering the character and cost of the work to be performed under the contract, the trial court found in effect that plaintiff's assignor had completed the work contracted for in accordance with the terms of the contract, but had included in its charge therefor an item of expense for certain work and labor performed in addition to the work and labor called for in the contract.

Upon the special issue of accord and satisfaction the trial court found in substance that the payment of one thousand and seventy dollars was made and accepted in full settlement of the obligation sued upon, and in this behalf found further that Beam, the deceased, had previously disputed the bill rendered by plaintiff's assignor in the sum of \$1,411.86 for the actual cost of clearing the lot, and had at all times protested that there was no other or greater sum due than one thousand dollars. It was further found that plaintiff's assignor accepted said sum of one thousand and seventy dollars with full knowledge of the intent and extent of its purported payment, and thereupon deposited the same in bank to the credit of a general account, and thereafter drew upon and expended said sum of one thousand and seventy dollars in the transaction of its business. Upon this issue of accord and satisfaction the trial court further found that Beam, the deceased, and the defendant W. Jessup & Sons, Limited, understood that the maximum charge of plaintiff's assignor for clearing the lot in question would not exceed the sum of one thousand dollars.

Upon these findings of fact the trial court concluded as a matter of law that the defendants were entitled to judgment for their costs, which was entered accordingly.

Upon this appeal (which is from the judgment and an order denying the plaintiff a new trial) it is insisted that the evidence does not support the findings upon the issue of accord and satisfaction.

This contention cannot be sustained. The evidence adduced upon the whole case, briefly stated, shows that the actual cost of clearing the lot amounted to the sum of \$1,411.86, which with the addition of fifteen per cent thereof,—namely, \$211.78, aggregated the sum of \$1,623.64. This was the amount claimed to be due plaintiff's assignor upon the completion of the work. As against this, however, there appeared a credit of fifteen dollars for certain material which was accepted by plaintiff's assignor as part payment in lieu of cash, and a subsequent payment by check in the sum of one thousand and seventy dollars, which left the sum of \$532.64 as the net balance claimed to be due plaintiff at the commencement of the action. The check referred to was received by one Crowley, the authorized and acknowledged manager for plaintiff's assignor, and by him accepted in full payment of the claim for \$1,623.64 previously presented in writing; and his receipt to that effect was indorsed upon said claim in the following words and figures: "Received of I. W. Beam \$1070 in full settlement of this bill.—B. & W. Engineering Company,—E. D. Crowley."

The evidence tended clearly enough to show that prior to the presentation and acceptance of the check for one thousand and seventy dollars the deceased Beam had disputed and refused to pay the claim upon the ground not only that the contract covenanted that the actual cost of the work would not exceed the sum of one thousand dollars, but that the charge therefor of \$1,411.86 as made by plaintiff's assignor included the cost of work and labor not called for by the contract.

Finally it was shown in evidence clearly and without contradiction that plaintiff's assignor had received and used in its business the sum of one thousand and seventy dollars, which was paid by check to Crowley, its manager, with full knowledge that such check was given and receipted for by Crowley in full settlement and satisfaction of all claims arising out of the contract in suit.

Plaintiff's claim that the evidence as outlined above does not support the findings upon the issue of accord and satisfaction is founded largely upon the contention that the clause in the contract relating to the cost of the work was nothing more nor less than an estimate, which could not be fairly considered or construed as a covenant that the cost of such work would in no event exceed the sum of one thousand dollars. With this contention as a basis it is insisted that the facts of the transaction show that the claim of plaintiff's assignor as originally presented could not have been honestly disputed; and from this it is argued that the finding of accord and satisfaction was not as a matter of law established by the evidence.

We are unable to agree with these contentions, and we are satisfied that the circumstances surrounding the transaction as revealed by the evidence upon the whole case afford ample support for the lower court's finding of fact to the effect that the original claim of plaintiff's assignor was extinguished by the execution of an accord and satisfaction.

The phrase "accord and satisfaction" as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined an agreement of accord and satisfaction is one whereby one of two parties having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. (Civ. Code, sec. 1521.) The effect of such agreement when executed is to extinguish the antecedent liability. (Civ. Code, sec. 1523.) As a matter of course an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement; and it may be conceded to be the law, as counsel for the plaintiff contends, that before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be shown that such dispute was *bona fide*. It is not required, however, in order to validate an executed agreement of accord and satisfaction, such as we have in the present case,

that the circumstances of the transaction upon which it was founded should affirmatively show that there was room for an honest dispute. The rule in this behalf is clearly and concisely stated in the case of *Simons v. American Legion of Honor*, 178 N. Y. 263, [70 N. E. 776], where it is said that "If a debt or claim be disputed at the time of payment, the payment, when accepted, of a part of the whole debt is good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such case is, Was the dispute honest or fraudulent? If honest it affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction."

It will thus be seen that in so far as the defense of an executed accord and satisfaction was concerned the trial court was not called upon to decide the question as to whether or not the covenant of the contract in controversy covering the cost of the work to be performed thereunder was fairly susceptible of the construction contended for by Beam. Upon this phase of the case the only question to be considered was whether or not there was in fact at the time of the acceptance and retention of the check in question a *bona fide* dispute concerning the sum due under the contract. This primarily was a question of fact to be determined by the trial court from all of the circumstances of the transaction (*Lapp-Gifford Co. v. The Muscoy Water Co.*, 166 Cal. 25, [134 Pac. 989]); and in the determination of that question the mere fact that it might have been held in an action involving the construction of the original contract, that plaintiff's assignor could not have been compelled to relinquish any portion of its original claim, was of no consequence in the face of the established fact that it did actually and knowingly accept a lesser amount in full satisfaction and settlement of its claim. (*Taylor v. Nussbaum*, 2 Duer (N. Y.), 302; *Roach v. Gilmer*, 3 Utah, 389, [4 Pac. 221].) In other words, where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake have adjusted existing differences concerning their relative rights and obligations arising out of a valid, pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made for the purpose of ascertaining which of the parties was right in the controversy which pre-

ceded and constituted the basis of such settlement (*Farmers Bank etc. v. Blair*, 44 Barb. (N. Y.) 641, 652; *Minor v. Fike*, 77 Kan. 806, [93 Pac. 264]; *Kiler v. Wohletz*, 79 Kan. 716, [101 Pac. 474]; 1 Page on Contracts, 321.)

But apart from these considerations it will be remembered that the evidence shows that the claim of plaintiff's assignor was disputed not only upon the ground that the contract in controversy covenanted that the actual cost of the work to be done thereunder would not exceed the sum of one thousand dollars, but also because the charge made therefor included the cost of additional and unauthorized work and labor. This additional and unauthorized work consisted of straightening a quantity of steel. Standing alone the preponderance of the evidence upon this phase of the case fully supports the finding of the lower court that such work was not called for by the contract, and in addition discloses ample justification for a *bona fide* dispute as to whether or not any charge could be rightfully made for such work. Therefore, aside from the question as to what construction might be fairly put upon the clause of the contract covering the actual cost of the work of cleaning the lot, it may be safely said that the evidence upon the whole case sufficiently shows that the sum sued for was honestly in dispute at the time the settlement in question was made.

It is next insisted that the findings of fact upon the issue of accord and satisfaction do not support the judgment in this, that it was not specifically and affirmatively found that the dispute which preceded the payment of the claim in controversy was genuine and made in good faith.

Conceding, without so deciding, that the good faith of a dispute which is claimed to be the basis of an executed agreement of accord and satisfaction should be affirmatively found, still the finding at which this criticism is aimed, when read in conjunction with the findings made upon the whole case, is not open to attack upon that ground. The *bona fides* of the dispute which in the present case was expressly found to be the basis of an executed agreement of accord and satisfaction, follows as an irresistible inference from all the facts and circumstances of the case and the acts of the parties which were found by the trial court to have attended the execution of the agreement. This being so, the finding as made sufficiently

supports the judgment. (*Emmal v. Webb*, 36 Cal. 197; *Coveny v. Hale*, 49 Cal. 552; *Smith v. Acker*, 52 Cal. 217; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, [14 Pac. 379]; *Mott v. Ewing*, 90 Cal. 231, [27 Pac. 194].)

The further claim is advanced that the evidence is insufficient to support the finding made upon the issue of accord and satisfaction in this, that it was shown in evidence that Crowley, the agent of plaintiff's assignor who effected the compromise in question, was merely the foreman of the work, and was neither expressly authorized, nor ostensibly empowered by virtue of his employment, to accept less than the full sum in dispute.

This contention, in so far as it relates to the nature and scope of Crowley's employment, is answered by the record before us, which shows unequivocally that it was an admitted fact in the case that he was the acknowledged and authorized general manager of the business conducted by plaintiff's assignor. The question as to whether or not his duties as general manager ostensibly or in fact empowered him to commute the claim in controversy need not be discussed or decided in view of the fact found by the trial court and established by the evidence that plaintiff's assignor finally accepted, retained, and eventually used in its business the money paid to Crowley, with full knowledge that such payment was made, accepted, and receipted for upon the express condition that it was in full settlement of the disputed claim. Such payment must have been accepted and retained upon the terms and conditions upon which it was originally offered and finally receipted for, or else it should not have been accepted at all. That is to say, if plaintiff's assignor was not willing to accept such payment in full satisfaction of its claim in keeping with the settlement made by Crowley it should, within a reasonable time, have repudiated such settlement and returned the money paid thereunder. (*Looby v. West Troy*, 24 Hun (N. Y.), 78.) Failing in this the acceptance and retention of the payment in question was, under all the circumstances of the transaction, tantamount to an express ratification of the compromise made by Crowley, and operated to estop plaintiff's assignor from denying the authority of Crowley to execute such agreement. (Code Civ. Proc., sec. 1962, subd. 3; Civ. Code, secs. 1589, 3519; *Gribble v. Colum-*

bus Brewing Co., 100 Cal. 67, [34 Pac. 527]; *Creighton v. Gregory*, 142 Cal. 35, [75 Pac. 569]; *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, [77 Pac. 405]; *Conde v. Dreisam G. M. Co.*, 3 Cal. App. 583, [86 Pac. 825].)

Incidental to the discussion of the sufficiency of the evidence generally to support the findings, the claim is made that the evidence called for and required a finding to the effect that the work and labor of straightening the steel which was removed from the lot were necessarily included in the work called for by the contract. The finding in question is important only in so far as it relates to the further finding that the claim of plaintiff's assignor was in dispute prior to the execution of the agreement of accord and satisfaction. The result of the action would not, however, have been altered even if the fact involved in the finding in question had been found in favor of plaintiff. The trial court, nevertheless, would have been justified in finding, as it did, that the claim of plaintiff's assignor was in fact disputed, and obviously, therefore, the judgment would be sufficiently supported if it were rested solely upon the findings of a pre-existing dispute and an executed agreement of accord and satisfaction.

But aside from this, the evidence adduced upon this phase of the case preponderates in favor of the finding as made; and even if this were not so such evidence is in substantial conflict, and consequently its sufficiency to support the finding referred to cannot be reviewed by this court.

Finally it is insisted that the evidence does not support the finding upon the issue of accord and satisfaction, and that such finding in turn does not support the judgment, because it was not shown in evidence nor found as a fact that the agreement to accept less than the sum originally claimed to be due was in writing.

In support of this contention we are cited to section 1524 of the Civil Code, which provides that "Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation."

The code section just quoted is evidently but a modification of the rule of the early common law which in effect provided that payment of an amount less than that due upon a liquidated and undisputed debt did not operate as a satisfaction, even though accepted as such.

The reason for the common law rule rested largely if not entirely upon the theory that an agreement to accept a part payment in satisfaction of a liquidated and undisputed debt was without a good and sufficient consideration, and therefore was but a mere *nudum pactum*. Accordingly it was uniformly held that such an agreement could not be relied upon nor pleaded as a defense to an action brought for the recovery of the whole of an indebtedness which admittedly was due and unpaid at the time the part payment was made. In this state, however, a written instrument was, contemporaneously with the enactment of section 1524 of the Civil Code, declared by section 1614 of the same code to be presumptive evidence of the existence of a consideration; and doubtless these two sections when read and construed together were intended as a relaxation of the rigors of the common law. However that may be, it is certain that section 1524 of the Civil Code has reference only to agreements of release and satisfaction made in cases where the obligation is neither doubtful nor disputed, and has no application to an *executed* agreement of accord and satisfaction founded upon the settlement and extinction of a disputed debt. (*Simmons v. Hamilton*, 56 Cal. 493; *Rued v. Cooper*, 119 Cal. 463, [51 Pac. 704]; *Flaningham v. Hogue*, 59 Ill. App. 315; *Reynolds v. Silvers*, 17 N. J. L. 275; *Farmers' Bank etc. v. Blair*, 44 Barb. (N. Y.) 641.)

Of course an accord without satisfaction will not operate to bar an action upon a disputed debt (*Simmons v. Oullahan*, 75 Cal. 508, [17 Pac. 543]); but parol evidence, even though it involve the subject matter of an executory contract which in itself would be within the statute of frauds, may be resorted to for the purpose of proving performance in satisfaction of the accord. (1 Beach on Modern Law of Contracts, sec. 437.) And where an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by the payment and acceptance of the lesser sum the original obligation is thereby extinguished. (*Holton v. Noble*, 83 Cal. 7, [23 Pac. 58].)

But one other point remains to be considered, and that involves the claim that the lower court abused its discretion in permitting the defendants, when the taking of evidence was concluded, to amend their answer to conform to the proof by specifically pleading the existence of an executed agreement of accord and satisfaction as a defense to the action. In this connection it is further contended that the answer as amended did not state facts sufficient to constitute such defense. At one time, in this state, there existed a confusion if not a conflict of authority upon the question as to whether or not the defense of accord and satisfaction was required to be specially pleaded.

In the very early case of *Gavin v. Annan, Lord & Co.*, 2 Cal. 494, it was held that the defense of accord and satisfaction might be relied upon and established under a mere general denial. To the same effect was the decision in the case of *McLarren v. Spalding*, 2 Cal. 510. Shortly thereafter, however, it was held in the case of *Fitch v. Brockman*, 2 Cal. 575, that it was error to consider the defense of accord and satisfaction unless specially pleaded, and subsequently the rule declared in the earlier cases above referred to was expressly repudiated in the cases of *Piercy v. Sabin*, 10 Cal. 22, 30, [70 Am. Dec. 692], and *Coles v. Soulsby*, 21 Cal. 47, where it was held that the defense of accord and satisfaction involved new matter which, if established, would avoid the action, and therefore should be specially pleaded. Later this was declared to be so because under our practice as codified a general denial puts in issue only the allegations of the complaint, and consequently would not suffice to apprise the adverse party of the new matter which he would be required to encounter and overcome at the trial. (*Glazer v. Clift*, 10 Cal. 303.)

The rule annunciated in the cases of *Piercy v. Sabin* and *Coles v. Soulsby*, was reiterated in the later case of *Sweet v. Burdett*, 40 Cal. 97. True it is that Pomeroy, in his work on Code Remedies, fourth edition, section 541, contends with strong reason that inasmuch as the defense of payment is permissible under a general denial, "similar defenses such as release, accord and satisfaction and the like, cannot with consistency be rejected," but the rule declared and followed in the series of cases commencing with *Piercy v.*

Sabin, 10 Cal. 22, [70 Am. Dec. 692], has not only never been disputed or departed from, but it has been cited with approval in the comparatively recent case of *Wilson v. California R. R. Co.*, 94 Cal. 166, [17 L. R. A. 685, 29 Pac. 861]. It may, therefore, be said with certainty that the settled rule of pleading in this state requires an agreement of accord and satisfaction to be specially pleaded before it can be availed of as a defense.

This rule, however, we take it is subject to the exception that if a plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tend to show an accord and satisfaction, the defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer. (*Looby v. West Troy*, 24 Hun (N. Y.), 78.)

Conceding, as we must, the established rule of pleading to be as stated, nevertheless we see no abuse of discretion in the order of the lower court permitting the defendants to amend their answer in the particular stated. Liberality in the allowance of an amendment to a pleading, particularly an amendment to an answer, is the rule rather than the exception; and in cases where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party it should be freely allowed.

In the present case the evidence up to the time of the interposition of the amended answer tended strongly to show the existence of an executed agreement of accord and satisfaction. This being so we are at a loss to perceive how the situation of the plaintiff could have been materially altered or his rights seriously impaired by permitting the defense of accord and satisfaction to be formally pleaded. It is the general rule that a defendant may plead as many defenses as the circumstances of the transaction in suit will permit. In the present case the defense of accord and satisfaction might have been rightfully interposed in the first instance, and therefore the amendment complained of could not and did not have the effect of rendering the situation of the plaintiff different from what it would have been if such defense had been specifically pleaded *in limine*.

The amended answer of the defendants in pleading the defense of accord and satisfaction allege "That on and prior to

the 11th day of January, 1907, said I. Willard Beam did dispute the bill theretofore rendered by the said B. & W. Engineering Company, and did protest that there was no other or greater sum due upon the obligation sued upon in plaintiff's complaint than the sum of \$1000; that on the said 11th day of January, 1907, the said I. Willard Beam offered to pay, and the said assignor of plaintiff did agree to accept, the sum of ten hundred and seventy (\$1070) dollars in full settlement, satisfaction and extinction of the said obligation sued upon in plaintiff's complaint; that thereupon, pursuant to said agreement, the said sum of ten hundred and seventy (\$1070) dollars was paid to and received by said assignor of plaintiff, and receipt in full settlement of said obligation was executed by said assignor of plaintiff, and that the said assignor of plaintiff received the said sum of ten hundred and seventy (\$1070) dollars so paid as aforesaid in extinction of said obligation, and in settlement and satisfaction of the bill rendered therefor, and did use the said money in the business of the said plaintiff."

The plaintiff did not demur nor seek time to demur to the answer as thus amended; but upon this appeal and for the first time assails the sufficiency of the facts alleged therein to constitute the defense of accord and satisfaction. However, with or without demurrer the answer as amended is invulnerable. Upon principle the defense of accord and satisfaction at the very best requires nothing more to be pleaded than the payment and acceptance, upon a mutual agreement express or implied, of a certain sum of money or other thing of value in full settlement and satisfaction of a pre-existing and previously disputed obligation. The pleading assailed in the present case more than meets these requirements. Indeed it would be difficult to formulate a pleading embodying the essentials of a good accord and satisfaction with greater perspicuity and precision.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 5, 1914.

[Civ. No. 1292. First Appellate District.—November 6, 1913.]

MARY M. MURDOUGH, Respondent, v. JAMES W. MURDOUGH, Appellant.

HUSBAND AND WIFE—DESEDITION—ACTION FOR MAINTENANCE.—In this action by a married woman for separate maintenance, the evidence is sufficient to show that her husband, after being informed that she was suffering from consumption, left her and resolved to live with her no more.

ID.—SEPARATE MAINTENANCE—AMOUNT OF ALLOWANCE.—If it appears in such case that the husband has a net income of one hundred dollars a month, an award to the wife of forty dollars a month for her separate maintenance will not be disturbed on appeal.

ID.—APPEAL—SILENCE OF RECORD—PRESUMPTION.—On appeal from the judgment it will be presumed that the trial court ruled upon a demurrer to the complaint, if the record fails to show that the court did not rule thereon.

ID.—ASSIGNMENT OF ERROR—GENERAL STATEMENT AS TO RULINGS ON EVIDENCE.—A general assignment of errors in the admission or rejection of evidence, by the statement in the appellant's brief that an examination of the record will satisfy the court of the correctness of his position, will not be considered on appeal.

APPEAL from a judgment of the Superior Court of Humboldt County. Clifton H. Connick, Judge.

The facts are stated in the opinion of the court.

Henry L. Ford, J. A. Prentice, and Otto C. Gregor, for Appellant.

Pierce H. Ryan, for Respondent.

KERRIGAN, J.—This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for maintenance taken within sixty days after its entry.

The complaint sets forth in two counts the willful desertion and willful neglect of the plaintiff by the defendant. To the complaint defendant filed a demurrer, and subsequently an answer and cross-complaint. After trial the court found, among other things, that defendant's income is two hundred dollars per month with board and lodging free, and

that his expenses do not exceed one hundred dollars per month; that the plaintiff is without funds or property; that defendant willfully deserted plaintiff; that he willfully neglected to support her; that plaintiff never deserted defendant; that she has been at all times willing to live with defendant and that forty dollars per month is a reasonable and necessary sum to be awarded plaintiff for her support and maintenance. Judgment was entered accordingly.

The defendant in support of his appeal urges that his special demurrer to the complaint should have been sustained; that the court, so far from sustaining it, never even ruled upon it, and he predicates error upon such omission.

The defendant filed his answer and cross-complaint, and went to trial without seeking to have the court rule upon the demurrer, and for this reason, perhaps, the special demurrer should be regarded as waived by the defendant. (*Reynolds v. Hosmer*, 45 Cal. 616; *Ward v. Clay*, 82 Cal. 502, [23 Pac. 50, 227]; *Harney v. McLeran*, 66 Cal. 34, [4 Pac. 884]; *Colton v. Onderdonk*, 69 Cal. 155, [58 Am. Rep. 556, 10 Pac. 395]; *Kirsch v. Derby*, 96 Cal. 602, [31 Pac. 567]; *De Martin v. Albert*, 68 Cal. 277, [9 Pac. 157]; *Rose v. Rose*, 112 Cal. 341, [44 Pac. 658].) But in any event it is sufficient to say that the record failing, as it does, to show that the court did not rule upon the demurrer, we will, as we are bound to do, presume, in favor of the judgment, that the court did rule thereon.

Moreover, an examination of the record shows that the complaint is not demurrable in the particulars set up.

The record is quite voluminous, consisting of approximately six hundred pages of typewritten matter, and any extended discussion of the evidence would make this opinion needlessly long and would serve no useful purpose. An examination of the record shows, contrary to defendant's contention, that the findings of the court find ample support in the evidence. The facts may be briefly summarized, in so far as they bear upon this question, as follows: The parties were married in the state of Illinois in the year 1899, and for the reason principally that the defendant was unable to obtain steady employment they did not live together much after their marriage until the beginning of the year 1909. There was, however, during that time no friction between them worthy of men-

tion, and when the plaintiff was not with her husband or at some place for her health she lived with her family in Chicago. In 1908 defendant was employed to manage a hotel in Eureka, California, and in April, 1909, he sent for the plaintiff, and she came and resided with him as his wife until the following June when, her health failing, she, with the consent of her husband, went to a health resort. Later her ailment was diagnosed as consumption, and she did not return to Eureka until August, 1910. Apparently from the time defendant learned that his wife was consumptive he did not want her to return to Eureka. She did, however, return, and lived there about a month when, at his earnest solicitation, she reluctantly went to her brother and sister in Chicago. The plaintiff paid her transportation, and later paid on her account for board and lodging the sum of seventy-five dollars. In March, 1911, he wrote her a letter saying, in part: "My affection for you has faded away and is dead; you are nothing to me and never will be. I am like a prisoner in captivity and confinement. . . . I am determined on a separation and nothing will ever tempt me to live with you again. . . . Your whole system is permeated with disease that has sapped your blood and vitality from your body." In April following he wrote her another letter, reiterating his determination never again to live with her. He wrote her brother a letter in which he stated that he had concluded to separate from the plaintiff, giving her ill health as his reason. In the same month he also wrote a letter to plaintiff's sister, in which he said that he had received a letter from his wife suggesting that she return to him. Commenting on this he said, in effect, that it was impossible. He was brutally frank in detailing his reasons for this conclusion. He stated in his testimony on cross-examination that it was his unalterable conclusion never to live again with plaintiff.

It is clear from the testimony introduced by the plaintiff that shortly after defendant had been informed that his wife was suffering from consumption, he resolved to live with her no more. Accordingly he persuaded her to return to her folks in the east, and shortly afterward he wrote her to the effect as just detailed. He is financially able to pay her forty dollars per month, and we have not the slightest hesitation in

saying that the evidence abundantly supports the findings, and the findings in turn sustain the judgment.

The defendant also asserts in his brief that the trial court committed numerous errors prejudicial to him in the admission or rejection of evidence. He depends upon no particular ruling of the court, and contents himself with stating that an examination of the record will satisfy the court of the correctness of his position. The record, as before stated, is over five hundred pages long. Such an assignment of errors is fair neither to opposing counsel nor to the court; and the appellate courts in this state have repeatedly held, as we now do, that points made in this manner will be ignored.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1394. Second Appellate District.—November 6, 1913.]

FRANK CRAYCROFT, Jr. et al., Petitioners, v. SUPERIOR COURT OF KERN COUNTY et al., Respondents.

STATE SCHOOL LANDS—LIMITATION OF TIME FOR CONTEST—PROHIBITION.—The superior court is divested of jurisdiction to hear and determine a contest of a certificate of purchase of state school lands after the lapse of five years from its date, and a writ of prohibition will lie to restrain it from exercising such jurisdiction.

APPLICATION for Writ of Prohibition to be directed to the Superior Court of Kern County.

The facts are stated in the opinion of the court.

L. L. Cory, Miles Wallace, and Lloyd, Cheney & Geibel, for Petitioners.

SHAW, J.—This is an application for a writ of prohibition to be directed to the superior court of Kern County and the judges thereof, prohibiting the said court from proceeding with the trial of a certain action pending therein, wherein Charles Smithwick is plaintiff and petitioners and others are

defendants. The subject of the action is the conflicting claims of the respective parties to the right to purchase from the state certain school lands described in the petition over which a contest arose in the office of the state surveyor-general and register of the state land-office, which contest was by order duly made referred for adjudication to said court.

The facts upon which this proceeding is based are, except as to some of the parties and the particular description of the land, identical with those involved in the case of *Craycroft Jr., v. Superior Court of Kern County*, decided by this court and reported in 18 Cal. App. 781, [124 Pac. 1042], wherein a writ of prohibition was ordered. Upon the authority of that case and for the reasons set forth in the opinion filed therein, it is clear that a peremptory writ of prohibition should issue in accordance with the prayer of the petition; and it is so ordered.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1181. Third Appellate District.—November 7, 1913.]

O. D. JACOBY, Appellant, v. W. S. PECK et al., Respondents.

LANDLORD AND TENANT—DESTRUCTION OF PREMISES—LIABILITY FOR RENT.—One who contracts with the lessees of certain premises to pay them a stipulated sum monthly for the remainder of their term in consideration of their transferring their interest to the owners of the property, and securing from them a lease direct to him for which the owners are to receive an additional rental, is released from his obligation to the original lessees on the destruction of the premises by fire prior to the expiration of the term.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Chickering & Gregory, for Appellant.

Henry G. W. Dinkelspiel, and Daniel A. Ryan, for Respondents.

BURNETT, J.—The appeal is upon the judgment-roll from a judgment of the superior court of the city and county of San Francisco, in favor of plaintiff, for the sum of twelve hundred dollars with interest and costs. The contention of appellant is that the conclusion of law from the findings of fact should be for a larger sum in his favor. The following facts are found by the court: On and prior to July 13, 1904, plaintiff's assignor, M. J. Keller Company, a corporation, was in the occupation of the premises known as 1028-1030 Market Street, San Francisco, under a lease from Messrs. Cook & Brunch, the owners of the property, the lease providing for a monthly rental of \$1,150, and to expire on December 31, 1907. On said July 13, 1904, the M. J. Keller Company and James J. Gildea entered into a written agreement reciting "that whereas, said party of the first part occupies the premises known as 1028-1030 Market Street, San Francisco, California, under a lease made by E. E. Cook and C. M. E. Brunch to the said party of the first part, said lease calling for the payment of a monthly rental of eleven hundred and fifty (1150) dollars and said lease expiring on the first day of January, 1908, and whereas, the said party of the second part desires to secure the said leasehold interest for the unexpired term thereof from and after the 15th day of September, 1904 . . . and whereas the lessors of said property have agreed to transfer and assign the said lease to said party of the second part in consideration of an additional monthly payment to them of one hundred dollars for the unexpired term of said lease;

"Now, therefore, it is hereby agreed by the parties hereto as follows, to wit:

"That said party of the second part shall, on or before the _____ day of _____, 1904, organize a corporation under the laws of the state of California which shall assume and agree to perform the following things: (1). Said party of the second part and said corporation so to be formed shall assume the lease of said property for the unexpired term thereof, from and after the fifteenth day of September, 1904, that is from the fifteenth day of September, 1904, to and including the 31st day of December, 1907, and shall pay the owners of said property a monthly rental thereof at the rate of twelve hundred and fifty dollars per month, payable in

advance, for the use of said building, and shall execute a lease containing the ordinary covenants.

"2. Said party of the second part and said corporation, so as aforesaid to be formed, shall pay to the said M. J. Keller Co., its successors and assigns, the sum of seventy-five dollars on said 15th day of September, 1904, and thereafter the sum of one hundred and fifty dollars upon the first day of each and every month to and including the first day of December, 1907, as a bonus to said M. J. Keller Co. for causing said lease to be transferred to said party of the second part.

"Said party of the second part further agrees that said party of the first part, its successors or assigns, shall have the right, whenever any payment of said sum of one hundred and fifty dollars remains unpaid thirty days after the same shall become due, to demand the same of the sureties hereinafter agreed to be furnished by said party of the second part, and if the same is not paid within thirty days after such demand, then, at its option, said party of the first part may declare the full amount of bonus remaining unpaid due and payable at once and proceed to collect all the unpaid bonus that at the time shall remain unpaid as rental for the full term of said lease."

The said Gildea furnished an undertaking for the faithful performance of his agreement and he also formed a corporation known as the J. J. Gildea Co. The said M. J. Keller Company released its said leasehold interest in said property to the owners of said property and secured for the said J. J. Gildea Co. from said owners a lease of the leasehold interest in and to said premises for the term beginning September 15, 1904, and ending December 31, 1907. On the eighteenth day of April, 1906, said premises were totally destroyed by fire.

The court concluded: "That in and by said destruction of said premises by fire said lease terminated and said defendant J. J. Gildea Co. became and was released and discharged from any liability to said plaintiff or his assignors, or either or any of them, for any and all amounts that would otherwise thereafter become due as and by way of bonus unpaid as rental." The correctness of this conclusion is the question involved on this appeal.

It is not disputed that by the destruction of the buildings the lease was terminated and the tenant thereby relieved of the obligation to pay any further rent to the owners. (Civ. Code, sec. 1933.) The application of this rule, however, to appellant here is denied by him, and it is insisted that the contract with the Keller Company contained no qualification of the promise to pay one hundred and fifty dollars per month up to and including December 31, 1907.

It is the contention of respondents that the contract should be construed as manifesting the intention of the parties that "Gildea be substituted in place of the former lessee in the payment of an increased rental to the former lessor for the enjoyment of the premises." In support of this construction, attention is called to the fact that, in one part of the said contract with the Keller Company, the monthly payment of one hundred and fifty dollars is called a rental; that said contract provided that "Gildea was to secure the leasehold interest of Keller Company for the unexpired term thereof"; that Gildea was to pay therefor a certain sum monthly to both Keller Company and the lessor; "the monthly payments by Gildea to the lessor and former lessee are to keep pace and be paid on the same day and for the same term of years, to wit, on the first day of each and every month to and including the first day of December, 1907," and "the payment by Gildea to Keller was not a fixed sum in monthly installments as in the case of the fixtures, but the payment of a monthly sum to keep pace with Gildea's enjoyment of the premises given by Keller Company to Gildea." Therefore it is argued that we have a case for the application of the principle of construction embodied in section 1650 of the Civil Code that "Particular clauses of a contract are subordinate to its general intent."

We think this view does no violence to the expressed will of the parties and that it is more just and equitable than the harsh construction insisted upon by appellant.

It appears plain enough, at least, that the consideration moving Gildea to enter into the contract with the Keller Company was the enjoyment of the possession of the premises for the period of time agreed upon. To secure this right, the promise was made to pay, as we have seen, a certain sum monthly to the owner of the property and another sum to the

Keller Company. Thereupon the Keller Company yielded its right to the possession and the owner executed the lease to the Gildea Company. It was, therefore, by the voluntary act of both the owners and the Keller Company that respondents secured the privilege of occupying and using the premises. Unless the Keller Company had divested itself of its leasehold interest, manifestly respondents could not have taken possession. Respondents, therefore, virtually hired the property of the owners and of Keller Company, but more directly of the latter, for a term ending December 31, 1907. It can make no difference in the substantial effect of the transaction that the Keller Company transferred or surrendered its rights to the owners and then the owners conveyed to the respondents. The result would have been the same if, with the consent of the owners, there had been a direct assignment to the second lessees by the Keller Company of the leasehold right. In either event, the right of possession for the term would be acquired at least partly through the act of the Keller Company. The same statutory provision, therefore, for the determination of the hiring from the owners applies to the hiring from the Keller Company. The obligation to pay further rent to either was at an end when the property, for the use of which the consideration was paid, was entirely destroyed.

We can see no special significance in the fact that, technically speaking, respondents became the tenants of the owners and not of the Keller Company, since it was by the act of the latter that the tenancy was made possible and available.

Neither do we perceive any reason for holding that this construction would destroy the consideration for the contract. The fact still remains that the Keller Company, at the time the contract was entered into, was occupying the buildings under a lease, and the surrender of the exclusive right to the possession, secured by said lease for the term ending December 31, 1907, was an essential prerequisite to the acquisition by the Gildea Company of said right of possession.

Indeed, we think, appellant has rather failed to appreciate the significance of the real consideration that moved Gildea in the transaction. We repeat—what he was attempting to secure and promised to pay for was the possession of the buildings for the term ending December 31, 1907. It was

sufficient to support the promise, but it was an executory and continuing consideration and liable to fail or to be defeated before the end of the term. For this reason, it may be assumed, the payments were to be made monthly. As a matter of fact, the consideration did fail before the end of the term by reason of the destruction of the subject matter of the contract. We think it follows that appellant should be paid only for the time that this consideration was rendered to the said Gildea Company—that is, until April 18, 1906.

If the Keller Company had sublet the buildings to the Gildea Company or had directly assigned the lease to the latter on the consideration that the entire rental be paid to the former, it would hardly be contended, we think, that the Gildea Company would be required to continue the payment of the rent to the Keller Company, although the latter was relieved of its obligation to pay anything further to the owners by reason of the destruction of the buildings. But we think the logic of appellant's position would lead to such an injustice.

We are persuaded that the lower court allowed appellant all that he was entitled to and the judgment is, therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1168. Third Appellate District.—November 7, 1913.]

B. DAVIDOW et al., Appellants, v. ANNA E. GRISWOLD et al., Defendants and Respondents; JOHN A. ASP-LUND et al., Intervenors and Respondents.

PLEADING—COMPLAINT IN INTERVENTION—DENIAL FOR WANT OF INFORMATION.—In a suit to quiet title, where the matters involved are of such a character that the plaintiffs cannot hide behind the pretense of want of information, their answer to a complaint in intervention is not good if in this form: "These plaintiffs have no information upon the subject sufficient to enable them to answer all of the allegations contained in the complaint in intervention, and basing their denial upon that ground these plaintiffs deny," etc.

ID.—DENIAL ON INFORMATION OR BELIEF.—By such allegations the plaintiffs do not even bring themselves within the provision of the code permitting an answer upon the ground of want of "information or belief."

DEDICATION—STREETS AND PARKS—ESTOPPEL WHERE LOTS SOLD WITH REFERENCE TO MAP.—Where the owner of land has it surveyed and platted as a townsite, files in the recorder's office a map delineating streets and parks, sells lots all over the tract described by reference to the map and upon representations that the streets have been laid out and dedicated to public use, and the lots are purchased and improved in reliance upon these representations, equity will not thereafter permit him to deny the dedication of the streets and parks as against the purchasers and the public.

ID.—STATUTE OF LIMITATIONS—WHETHER BARS RIGHT TO USE STREETS.—The statute of limitations can be of no avail as against the right of the public to use the streets thus dedicated; and even if the dedication is considered available only to the large number of persons who purchased lots, there is sufficient evidence in the record to support the finding against the bar of their right by the statute.

APPEAL from a judgment of the Superior Court of Sonoma County and from an order refusing a new trial. Thomas C. Denny, Judge.

The facts are stated in the opinion of the court.

Walter H. Robinson, and W. F. Cowan, for Appellants.

U. S. Webb, Attorney-General, and Chas. M. Bufford, for Respondents.

BURNETT, J.—This is an action to quiet title and the main question is whether plaintiffs are estopped from denying the dedication of certain parks and streets as delineated on a map of the townsite of Los Guilicos, afterward known as Kenwood, in the county of Sonoma. There is little controversy as to the vital facts, most of them having been stipulated at the trial. It is not disputed that two maps were filed, one on the ninth day of August, 1887, entitled, "Map of the Town of Los Guilicos, Sonoma County, Cal.," and the other on the twentieth day of February, 1893, entitled, "Revised map of the town of Kenwood, formerly Los Guilicos, Sonoma

Co., California," and that the latter was a duplicate of the former except as to the name of the town.

It is admitted by appellants that, by reason of the filing of these maps, there was an offer of dedication of the property in controversy, but it is contended that the offer was not accepted and it was afterward withdrawn and revoked.

On the other hand, respondents claim that, by reason of the filing of these maps and the sale of many lots in accordance therewith, an acceptance of the offer of dedication was necessarily implied and that thereby the dedication became complete and beyond the power of recall or revocation. The common source of title is the Sonoma County Land and Improvement Company, and it was stipulated: "That on Jan. 30, 1887, Sonoma County Land & Improvement Company, then a corporation, became the owner in fee simple of those portions of subdivisions 6 and 7 of Los Guilicos Rancho, Sonoma County, lying south and west of the county road leading from Sonoma to Santa Rosa; that all the land delineated upon the maps introduced in evidence in this action is included within said portions of said subdivisions of said rancho.

"That between January 30, 1887, and October 18, 1894, said Sonoma County Land and Improvement Company executed and delivered to a large number of persons about 75 deeds to a large number of parcels of land in said townsite, describing them in nearly every instance as the same are numbered and indicated on the map filed August 9, 1887, and in such deeds made reference to said map, all of which deeds were, subsequently, recorded in the office of the county recorder of Sonoma County.

"That the chain of title through which plaintiffs acquired the property described in the complaint contains a number of deeds, wherein it is described by lot and block numbers, referring to the one or the other of the two maps of 1887 and 1893.

"That the Sonoma County Land & Improvement Company, on Jan. 24, 1890, executed and delivered a deed to the North Pacific Land & Improvement Company, its successors in interest, conveying all unsold lots in the townsite of Kenwood, and therein described them by lot and block number and referred to the map of 1887.

"That between Feb. 20, 1893, and Sept. 14, 1898, the Sonoma County Land & Improvement Company executed and delivered to some twenty different grantees deeds to a large number of parcels of land in said townsite, describing the same in nearly every instance by lot and block number, as they appear on the map filed Feb. 20, 1893, and in such deeds referred to such map, all of which deeds were later recorded."

These maps, it may be said, and the surveys therein delineated were made by Preston R. Davis, county surveyor of Sonoma County, under the direction of the said land and improvement company, and the townsite as shown by said maps was laid out on the ground and indicated by appropriate monuments. The said company and its successor in interest, the North Pacific Land and Improvement Company, caused copies of said maps to be published in print and to be furnished to intending purchasers, and they represented to the purchasers of lots that the same was a true map of said townsite as the same has been laid out and dedicated to public use and, in making deeds to said purchasers, they described the lots with reference to the streets and avenues and block and lot numbers indicated on said maps, and the purchasers bought their lots in reliance upon said representations and said maps, and many of said purchasers and their successors in interest, upon the faith of said representations and said maps, placed expensive improvements upon their respective holdings.

We are justified in saying that all the foregoing facts are shown by the evidence, the stipulations of the parties and the admissions of the pleadings. Indeed, it is hardly necessary to go beyond the pleadings themselves. The said facts, with others, are set out in the verified complaints in intervention and the purported denial is so equivocal and evasive that plaintiffs could have no just cause for complaint if their answer were treated as an admission of the existence of the facts not covered by the stipulation. Their answer is in this form: "These plaintiffs have no information upon the subject sufficient to enable them to answer all of the allegations contained in the complaint in intervention and basing their denial upon that ground these plaintiffs deny," etc. The matters were of such character that the plaintiffs could not

hide behind the pretense of want of information. (*Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, [114 Pac. 1026].) Besides, in the absence of an averment to the contrary, we must assume that the plaintiffs *believed* the facts to be as alleged in the complaint in intervention. They did not even bring themselves within the provision of the code permitting an answer upon the ground of want of "information or belief." (Code Civ. Proc., sec. 437.)

If we may state it more concisely, we have, then, this situation: The owner of a tract of land has it surveyed and platted as a townsite. He has a map of it, upon which are delineated streets and parks, filed in the recorder's office. He sells lots all over this townsite, described by reference to this map, and, moreover, upon the positive representation that the streets have been laid out and dedicated to public use, and, in reliance upon these representations, the lots are purchased and improved. This may not be *dedication* in the strict acceptance of that term but the result is the same. The owner has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the said purchases under the conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. And if they are to be considered as really streets and parks when we regard the rights of the purchasers, it is difficult to understand how their *status* would be changed when we regard the rights of the public generally.

We think the principles covering the case are clearly stated in *San Leandro v. Le Breton*, 72 Cal. 170, [13 Pac. 405], and *Archer v. Salinas City*, 93 Cal. 43, [16 L. R. A. 145, 28 Pac. 839].

In the former it is said: "It is settled law that where one owning land lays off a town or village thereon and makes a map of the townsite showing it to be divided into streets, alleys, blocks, and lots and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public. There are many cases to this effect, but only a few

need be cited. . . . And if there be public squares or plazas represented on the map, the same rule applies to them, and dedication thereof may be established in the same manner." Citing cases.

In the Archer case it is said: "Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. (*Harding v. Jasper*, 14 Cal. 648.) It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express, and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets.

Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use. . . . If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated whenever convenience or necessity may suggest." A very large number of cases from other jurisdictions holding similarly is cited by respondents but we may forego specific consideration of them. In some, it is assigned as a sufficient reason for saying that the dedication is complete that the purchasers represent the public, that the latter is not a distinct class from the former, that the purchasers are as much a part of the public as those who use the streets for the purpose of travel and that they have equal authority to accept a dedication of the streets for the public.

Of course, it is not to be understood that the mere laying out of lots and making a map showing streets deprive the

owner of the right to use the property as his own. This would constitute at most an offer of dedication and an acceptance must follow to vest the public with a right which the owner cannot gainsay. The sale and purchase of the lots "describing the streets as boundaries constitute covenants with the purchasers that the streets are dedicated to their use and to the use of the public," and are sufficient proof of dedication.

Different courts, as already stated, have adopted different terminology to describe the situation involved in a case like this but it is probably more a difference in words than in doctrine.

The United States supreme court, in the case of *City of Cincinnati v. Lessees of White*, 6 Pet. 431, [8 L. Ed. 452], characterizes the principle as "in the nature of an estoppel *in pais* which precludes the original owner from making such dedication. It is a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

It is virtually conceded by appellants that the contention of respondents is supported by their citations but it is insisted that the said California decisions were subsequently overruled and that they do not declare the law as it obtains now in California. We do not think the conclusion is warranted by a fair examination of the cases to which attention is invited. It is true that there are expressions found in some of these cases inconsistent with the statements that we have already quoted but it is quite apparent that they were not necessary to the decision.

The San Leandro case is criticised and its doctrine repudiated in *People v. Reed*, 81 Cal. 70, [15 Am. St. Rep. 22, 22 Pac. 477], but that in the latter the supreme court was confronted by an entirely different situation appears from the recital of the following facts: The map made of the property was never recorded; the part of the alleged street in controversy was never opened as a street, but for many years had been fenced and occupied by substantial and permanent buildings; no sales of lots thereon were ever made and there was no finding that the individuals who purchased the property in other parts of the alleged street had ever seen the map of the property or had any information at the time they purchased

that a street was laid out at the place in controversy. It was therefore properly held that the acts of the owner did not constitute an irrevocable dedication of the street, and it is to be observed also that as to some of the statements in the opinion this comment is made in the Archer case: "There is nothing decided in *People v. Reed* inconsistent with the foregoing principles, although there are certain expressions in the opinion in that case that may seem at variance therewith; but they were *obiter dicta*, or side remarks, and *unauthoritative* views of the justice who wrote the opinion."

The San Leandro case is, in the Archer opinion, approved in the following language: "The principles relative to dedication and an offer to dedicate which are laid down in that case are in accord with the law upon that subject, as well as with previous decisions in this state, and should have controlling effect in the present case."

The decision in *Schmidt v. San Francisco*, 100 Cal. 302, [34 Pac. 961], was grounded upon the proposition that the purchasers of lots "could have no interest in having a *cul de sac* established in a block which was then entirely unimproved and in which they owned no property," but it is conceded in the opinion that the purchasers from the original owner "had a right to insist upon the entire scheme under which they were induced to purchase, so far as any benefit could possibly accrue to them therefrom," and it was declared that "It will not be disputed that the survey and map, accompanied by the solemn declaration of the owner, followed by sales and conveyances of a large portion of the property described by reference to the map, constituted, as to the owner, a complete dedication of the property designated on the map as streets." This last remark describes the condition here and it is additional assurance of the soundness of respondents' position.

In *Sacramento v. Clunie*, 120 Cal. 29, [52 Pac. 44], the evidence is reviewed and, while conceding that it was probably sufficient to support a finding of dedication, it was held not sufficient to reverse a finding of no dedication. The peculiar and persuasive circumstances in that case are disclosed by the following quotation from the opinion: "In this case there never has been any acceptance upon the part of the city, by user, of the offer of dedication made by the parties filing the Ruth map. Forty years have gone by. During all this time

these streets have been barred from travel, and valuable and permanent improvements placed thereon. Under such circumstances, in the absence of user, it would seem that a direct and explicit acceptance upon the part of the city of an offer of dedication might well be demanded by the trial court before dedication as a fact would be found."

In *City of Los Angeles v. Kysor*, 125 Cal. 463, [58 Pac. 90], it was held that the evidence was conflicting as to dedication and, furthermore, that "the record of a map with the designation of streets and parks therein and the sale of lots by such map . . . cannot conclusively establish the dedication of a park designated thereon to public use," but that a finding of no dedication will be sustained "where no public acceptance of the offer is established and the evidence tends to show a revocation of the offer."

City of Anaheim v. Langenberger, 134 Cal. 608, [66 Pac. 855], was a similar case and it was said therein: "By the facts of this case, there appears to be nothing more than an offer to dedicate the plaza to the public. The offer was made more than thirty years before this action was brought. During that entire time the city never made a sign that it accepted the offer. No formal acceptance was entered; no implied acceptance is shown. The first intimation the city gave of its claims to the plaza is found in the commencement of the present action. Certainly, the commencement of this action can hardly constitute an acceptance of an offer to dedicate made twenty years before."

In the three foregoing cases it is to be noticed that the actions were brought by the city in each instance and that the vital question involved was whether there was support for the finding of "no dedication to the public."

The judgment against the plaintiff in *City of Monterey v. Malarin*, 99 Cal. 290, [33 Pac. 840], was affirmed on the ground, as stated by the supreme court, "that the owner never intended or offered to dedicate to the public the strip of land referred to for a public use, or ever acquiesced in or assented to the use thereof for such purpose, or ever had any knowledge of such use by the public, or that the municipal authorities ever performed any act or asserted any right whatever thereto."

In *Prescott v. Edwards*, 117 Cal. 298, [59 Am. St. Rep. 186, 49 Pac. 178], the judgment was in favor of plaintiff for a private right of way, the finding being therein that there was no dedication of the land to the public as a highway. The judgment was affirmed on the ground that the defendant, at the time plaintiff purchased his lot, pointed out to the latter the strips of land fronting on said lot as streets and that, under the circumstances, it would be a gross injustice for the owner to deprive the purchaser of the privilege of using such strips of land as streets, and it is said: "The decisions of this court, where it is declared that as to the purchase of lots adjoining platted streets such streets are dedicated by the owner, mistake the true doctrine in form rather than in substance, for it is the doctrine of estoppel *in pais* that gives the vendee his remedy, and prevents the practice of injustice by the vendor."

In *Myers v. City of Oceanside*, 7 Cal. App. 87, [93 Pac. 686], the evidence showed "no express dedication, and no filing of any map having the park delineated thereon and nothing beyond an offer of dedication," and it was held that the evidence was sufficient to support the conclusion of the trial court that there was no dedication to the public. It was declared that "the question of intention is the controlling one in all matters of dedication and it is a question of fact on which the finding of the trial court must be sustained if there is any evidence to support it."

In *Wolfskill v. Los Angeles County*, 86 Cal. 412, [24 Pac. 1094]; *People v. Marin County*, 103 Cal. 223, [26 L. R. A. 659, 37 Pac. 203]; and *Los Angeles v. McCollum*, 156 Cal. 148, [103 Pac. 914], the evidence was reviewed by the supreme court and held in each instance to be sufficient to support the claim and finding of dedication.

We conclude that there is ample authority and sound reason for holding that there was here a complete dedication, or what is equivalent thereto, of said streets and parks.

There has been no abandonment by the public of their right and the surrender by the owner of these public places for the use of the people is still operative and effective for the purposes which, as we have already shown, were clearly intended and designated.

The statute of limitations was, indeed, urged by appellants but, of course, this could be of no avail against the public, and if we consider the dedication available only to the large number of persons who purchased lots, there is sufficient evidence in the record to support the finding against the bar of the statute.

Another finding which is assailed by appellants is that interveners, John A. and Anne Kirstine Asplund, are the owners of an easement of way along a certain road known as Kenilworth Avenue. The claim to the easement was based upon an asserted title by prescription and we think the court was justified in upholding it. Mr. John Asplund testified: "Kenilworth Avenue starts from Mervyn Avenue and goes across Sonoma Creek and past my house up in the cañon, and from there it extends through. There are several property owners along the road, among them Pederoncelli, and Mrs. Knell and Parker. It was there ever since Kenwood started in 1887 or 1888. Mr. Rohrer lived up there in the cañon and built a road. It was used by the different people who had to go up there. The road would be a mile long, probably. I have ridden over it thousands of times, sometimes every day, going to get the cows. No one has ever objected to my passing over it. There was objections some fifteen years ago; Mr. Crozier lives on it, and he put a gate across the road, and Mr. Parker sued him, and Supervisor Thompson cut the wire, and it has been open ever since. I have graded and graveled that part of it from Mervyn Avenue up to my house on my own account. It is used by a great many people right along every day." The only fair inference from the foregoing is that the use of the road was under a claim of right. The manner of the use is the best evidence of its character. Asplund having used the road all these years as though he had the right to do so, the conclusion rationally follows that he intended to assert his adverse claim and that his acts were indicative of a purpose to maintain it.

Some other questions are discussed but we deem it sufficient to say further that, in our opinion, there is no prejudicial error shown by the record and we think the judgment and order should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court. after judgment in the district court of appeal was denied by the supreme court on January 6, 1914.

[Civ. No. 1171. Third Appellate District.—November 7, 1913.]

THE PEOPLE, by U. S. Webb, Attorney-General, Plaintiff,
v. **CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY** (a Corporation), et al., Defendants;
EMMA J. WHITE, Intervening Petitioner and Appellant,
FRANK J. SYMMES, Receiver, Respondent.

BANKS AND BANKING—CERTIFICATE OF DEPOSIT—RELATION BETWEEN PARTIES.—A certificate of deposit is substantially a simple receipt of a bank, negotiable in form, for a certain sum of money; it creates no trust relation between the depositor and the bank, but merely the relation of debtor and creditor.

Id.—CERTIFICATE OF DEPOSIT—AMOUNT OF NOT A SPECIAL DEPOSIT.—Where attorneys receive a check from a client with instructions to obtain payment thereof, pay certain claims, and forward the balance to her, and they deposit the check in a bank to the credit of their general account, and subsequently present their check on such account, drawn to the order of the bank, and the bank issues a certificate of deposit for the same amount payable to the client, and the attorneys forward the certificate to her, and thereafter the bank closes its doors and refuses payment of the certificate when presented, a special deposit or trust relation was not thus created in favor of the client, but the money involved continued to constitute a part of the general funds of the bank subject to claims of its creditors without any preference in her favor; there being nothing to show that the bank expressly or impliedly agreed to hold the money in trust for her or her assignee, or that it agreed to transmit the money to her.

Id.—GENERAL AND SPECIAL DEPOSITS DISTINGUISHED—INTENTION OF PARTIES.—A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical coin or other article deposited. Whether a deposit is general or special depends upon the intention of the parties. A deposit will, however, always be deemed to be general, unless made special by agreement. And something more than the intent of one of the parties is necessary to make a deposit special; the intent of both parties must be shown to concur, either expressly or by implication.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Aitken & Aitken, for Appellant.

De Laveaga & Magee, for Respondent.

CHIPMAN, P. J.—The action to recover the sum of \$847.50, alleged to be held by defendant, said trust company, as a special deposit and as the property of petitioner, Emma J. White.

At the close of petitioner's evidence, the motion for a nonsuit, made by said receiver, was granted. The appeal is from the judgment of nonsuit and from the order denying motion for a new trial.

The facts in the case appear from the testimony of Frank W. Aitken, as follows:

"On or about October 14, 1907, Aitken & Aitken received one thousand dollars, the property of Emma J. White, in the form of a check on a bank in Oakland, under instructions from her to obtain payment thereof, compromise and pay certain claims, and forward the balance to her, and deposited said check with the California Safe Deposit and Trust Company, Fillmore Street branch, to the credit of Aitken & Aitken. I am and on and since said date have been one of the members of said firm of Aitken & Aitken. On October 30, 1907, at about half past twelve o'clock, noon, I presented to the California Safe Deposit and Trust Company, Fillmore Street branch, a check on said account, drawn to the order of said bank, in the sum of \$847.50. I presented that check to G. Chevassus, who was the accountant and acting as the paying teller. I told him that we wanted to have the money sent to Tacoma; that it was to be paid to Mrs. Emma J. White at that city. He referred me to Mr. Dawson, who was one of the bank clerks. I told Mr. Dawson that I had given Mr. Chevassus a check for \$847.50 and that the money was to be sent to Tacoma and paid to Emma J. White at that city. He said the most convenient way would be to have a certificate

of deposit issued, payable to Mrs. Emma J. White, and that she could indorse the certificate and deposit it in a Tacoma bank, and upon its return to the California Safe Deposit and Trust Company it would be paid. I told him that that way would be satisfactory, and the California Safe Deposit and Trust Company then issued its certificate of deposit for \$847.50 and delivered it to me. Said certificate of deposit was as follows:

"Uptown Branch,

"CALIFORNIA SAFE DEPOSIT AND TRUST COMPANY.

"1740 Fillmore Street, South of Sutter.

"San Francisco, California, Oct. 29, 1907.

"No. 585.

"This is to certify that Aitken & Aitken have deposited with California Safe Deposit and Trust Company of San Francisco, California, the sum of eight hundred forty-seven 50/100 dollars \$847.50. Payable to the order of Mrs. Emma J. White in lawful money of the United States on the return of this certificate properly indorsed.

"(Signed) S. H. PATTERSON,

G. CHEVASSUS,

"Accountant.

Branch Manager.

"Not subject to check.

"Certificate of Deposit

"Payable only through

"Payable without interest

"San Francisco

"Clearing House.

"We sent the certificate to Mrs. White at once. It was presented to the California Safe Deposit and Trust Company, through a bank in Tacoma, but payment was refused."

He testified further: "I did not get back the check from Mr. Chevassus, the paying teller. When I gave it to him he kept it and informed Mr. Dawson of it. I walked down the aisle to another part of the bank where Mr. Dawson was; I told him I had given the check to Mr. Chevassus. The check was returned to us afterward. It was perforated with the word 'Paid' and the figures '10-30-07.' We afterward received a statement from the California Safe Deposit and Trust Company showing that the \$1,000.00 had been received from the bank in Oakland on or about October 14, 1907, and that the check referred to, for \$847.50, had been withdrawn and deducted from the account on October 30, 1907."

It was admitted by the receiver "that the check was duly charged to the account and entered as paid on October 30, 1907."

It seems to be conceded that the bank suspended business at some hour after the transaction above narrated. The certificate is dated October 29, which was probably an inadvertence, as it was issued on October 30. No question arises out of the fact that the bank suspended on the day the certificate was issued.

Appellant states her position thus: "On these facts it seems clear that the \$847.50 constituted a deposit for a specific purpose—payment to Mrs. White at Tacoma, through whatever bank might present the certificate after she had indorsed it. Such a deposit, described by several courts as a 'special' deposit or as a 'specific' deposit (or deposit for specific purpose), is uniformly considered a *trust deposit* which does not become the property of the bank, but may be recovered in full, after insolvency, in preference to the claims of general depositors." Again: "It is not material that the deposit in this case was not in actual money and did not at the moment add actual visible assets. A check on an existing sufficient balance, drawn to the bank's order, and taken by the bank as cash, must be considered equivalent to actual money; and as such check could have been cashed and the money handed over the counter, it is immaterial that the bank assumed, instead, to cash it behind the counter instead of demanding the useless formality of having the money handed out and forthwith handed back again."

Respondents's position is thus summed up: "First, No specific deposit for a definite purpose was made, hence, no trust fund was created by the issuance of the certificate of deposit to appellant; second, No actual deposit of money was made at the time the certificate of deposit was issued, hence, the assets of the bank were not increased by the transaction in question, and without an actual increase of assets no preferred claim could possibly arise."

The original deposit of the one thousand dollars on October 14th, was a general deposit and created the relation of debtor and creditor between the bank and the depositors, Aitken & Aitken. (2 Morse on Banks and Banking, sec. 568.) In

point of fact, they were Mrs. White's agents and the money belonged to her.

The case, therefore, is simply that of a depositor desiring to have a portion of her deposit remitted to her at a distant place. Did her agents, in accomplishing this purpose, so conduct the transaction as to convert the \$847.50 into a special or specific fund or to make the bank a trustee of Mrs. White and a holder in trust of that money for her? Mr. Aitken's testimony simply shows that the depositors, Aitken & Aitken, wanted to send the money to Mrs. White at Tacoma and were told that the most convenient way would be to take a certificate of deposit payable to her and she could indorse it and get her money through a Tacoma bank upon the return of the certificate. Mr. Aitken adopted this method. Unfortunately, the bank became insolvent and the certificate was not paid. We cannot discover any request made of the bank to send the money, or any agreement by it to send the money. The same result might have been accomplished had the bank certified the check given by Aitken & Aitken, and had they sent it to Mrs. White, or by a draft upon some bank at Tacoma or elsewhere.

There was no money in fact deposited by Mrs. White and there was no withdrawing of any money from the bank. The check for \$847.50 was marked paid and reduced the credit account of her agents, Aitken & Aitken, by that much and on the bank-books the amount was doubtless charged to outstanding certificates of deposit account. There is no evidence that the bank expressly or impliedly agreed to hold this money in trust for Mrs. White or her assignee, nor did it agree to transmit the money to her. True, it is our duty, in case of judgment on nonsuit, to give to the evidence the most favorable interpretation of which it is reasonably susceptible in support of petitioner's claim. If it could be reasonably inferred from Mr. Aitken's testimony that, notwithstanding the fact that the certificate of deposit strongly rebuts the idea of a trust relation, his intention was to create such trust and what he said and did was so understood by the bank or must be presumed to have been so understood by it from what was said and done, we think the rules of law would require of us to accept such understanding of the parties. But we fail to discover in anything said or done by Mr. Aitken at

the time from which he had a right to assume that the bank officers understood the bank's relation to Mrs. White to be other than that created by the certificate of deposit. The certificate of deposit has none of the earmarks of a special deposit of money which the bank had no right to mingle with its funds or treat as its own. On its face it creates the relation of debtor and creditor between itself and Mrs. White. Aitken & Aitken were her agents in the matter and for her consented that the transaction should take this form, and it seems to us the certificate is very significant, if not conclusive, as showing what the understanding was.

Mr. Morse says such certificates are but acknowledgments of the bank that it has received from certain persons certain sums of money. "In form they are substantially simple receipts of the bank, in negotiable form, for so many dollars, and so are only evidence of an indebtedness, like the bank-book." (1 Morse on Banks and Banking, sec. 297.) "They create no trust relation between the depositor and the bank, but merely that of debtor and creditor." (Id., sec. 298. See, also, *Murphy v. Pacific Bank*, 130 Cal. 542, [62 Pac. 1059].)

In our opinion, the money involved continued to constitute a part of the general funds of the bank subject to claims of its creditors without any preference in favor of Mrs. White. Such would seem to us to result from the views taken by the courts and law writers, some of which we will notice. The definitions given of general and special deposits do not differ materially. In *Butcher v. Butler*, 134 Mo. App. 61, [114 S. W. 564], the court said: "A general deposit is where the bank is given custody of the money deposited with the intention expressed or implied that the bank is not required to return the identical money, but only its equivalent; the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited in which case the title remains with the depositor, and if the subject be money, the bank has no right to mingle it with other funds." Our own supreme court has said: "Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of

the pledgor, title does not pass to the bailee or pledgee, but remains in the pledgor. The pledgee acquires no right to make general use of the property." (*Anderson v. Pacific Bank*, 112 Cal. 601, 53 Am. St. Rep. 228, 32 L. R. A. 479, 44 Pac. 1063[.]) The supreme court of Arkansas thus defines a special deposit: "If the agreement between a bank and its depositor is that the identical coin or currency shall be laid aside and returned, it is a special deposit, but if the money is to be returned, not in the specific coin or currency deposited, but in an equal sum, it is a general deposit." (*Warren v. Nix*, 97 Ark. 374, [135 S. W. 896].)

"In using deposits made for the purpose of having them applied to a particular purpose the bank acts as the agent of the depositor, and if it fail to apply it at all, or misapply it, it can be recovered as a trust deposit." (5 Cyc. 515.) Mr. Morse says: "When money is deposited to pay a specified check drawn or to be drawn, or for any purpose other than mere safekeeping, or entry upon a general account, it is a specific deposit, and title remains in the depositor until the bank pays the person for whom it is intended, or promises to pay it to him. . . . A deposit of money to pay a specified note is a specific deposit." (1 Morse on Banks and Banking, sec. 185.) "A deposit is general unless expressly made special or specific." (Id., sec. 186.)

An extended note is found in the report of the *Piano Manufacturing Company v. Auld*, 14 S. D. 512, [86 N. W. 22], in vol. 86 Am. St. Rep. 775 et seq., giving a very full discussion of the question: "When a bank does not take title to money deposited with or collected by it and the right to recover such money upon the insolvency of the bank." Among other propositions supported by numerous decisions is the following: "It is well settled that the estate of the insolvent bank must actually be augmented by the money or property which it is sought to recover as a trust fund. If the transaction amounted to no more than an exchange of creditors, the mere canceling of one liability and the assumption of another, or if the money was used in the discharge of an indebtedness, it is obvious that the assets in the hands of the receiver have not been increased thereby, and there can be no recovery as of a trust fund." (P. 806.) Again, as to what constitutes a special deposit: "It is in many cases a very

doubtful question whether a deposit is general or special. The distinction is theoretically plain. A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical coin or other article deposited. The difficulty lies in the determination of what was intended by the parties to the deposit. Whether a deposit is general or special depends, of course, upon the intention of the parties. A deposit will, however, always be deemed to be general, *unless made special by agreement.*" (P. 778.) Something more than the intent of one party to the deposit is necessary—the intent of both parties must be shown to concur either expressly or by implication.

Appellant, in applying the rule laid down by Mr. Morse, claims that "the certificate of deposit was the note of the bank to Mrs. White." While some courts have so held, most of the courts and our supreme court hold otherwise. (*Murphy v. Pacific Bank*, 130 Cal. 542, [62 Pac. 1059].) Appellant, in confirmation of her application of the rule, cites numerous decisions. But, with one or two exceptions, which will be noticed, they are clearly distinguishable from the case here. For example, one bank sent a note to another bank for collection; the note was collected, but before the money was remitted the latter bank failed. (*Capital National Bank v. Coldwater National Bank*, 49 Neb. 786, [59 Am. St. Rep. 572, 69 N. W. 115].) In another case, the bank received the money for the express purpose of paying it to the holder of a note. (*Ryan v. Phillips*, 3 Kan. App. 704, [44 Pac. 909].) In another, the bank received the money, in its trust capacity, for the specific purpose of security for the benefit of a third person. (*Woodhouse v. Crandall*, 197 Ill. 104, 58 L. R. A. 387, 64 N. E. 292].) Again, in *Star Cutter Co. v. Smith*, 37 Ill. App. 215, the money was deposited for the express purpose of paying a particular check when presented. The money was not credited to the general account of the depositor. In *St. Louis v. Johnson*, 5 Dill. 241, Fed. Cas. No. 12,235, money was sent to a bank in New York city to pay certain bonds of the city of St. Louis. In *Shoptert v. Indiana Savings Bank*, 41 Ind. App. 474, [83 N. E. 515], money was deposited for the express purpose of paying a third party the purchase price of a machine.

In all these cases the deposit was made subject to an agreement by the bank that the money would be used in some particular manner or to pay some specified third person. Where, however, the deposit is for the credit of the depositor or some other person, as in the case of a certificate of deposit, there is no intent to make a payment of some specific claim of a third person, as in the cases cited. There was here no agreement by the bank to pay the specific claim of Mrs. White. Its agreement was to pay the certificate of deposit according to its terms and it implied no obligation to hold as a trust fund the amount called for in the certificate. The distinction is aptly stated by the United States supreme court, in *Libby v. Hopkins*, 104 U. S. 303, [26 L. Ed. 769]: "When A sends money to B with directions to apply it to a debt due from him to B it cannot be construed as a deposit though B be a banker. The reason is plain—the consent of A that it was to be considered as a deposit and not a payment is necessary and is wanting." If Mrs. White may be treated as the owner of the money originally deposited, which was the fact, there was no change in the deposit save as to its form. The relation of the bank did not change, but it remained her debtor. Had Mr. Aitken purchased a draft and remitted it, his check being charged to his account, no trust fund would have resulted. (*People v. Merch. & Mech. Bank*, 78 N. Y. 269, [34 Am. Rep. 532].)

Respondent contends, with much earnestness, that, as there was no increase of assets of the bank, a preferred claim could not possibly arise. Attention is called to the fact that the deposit of appellant's money was made more than two weeks before the bank closed its doors, admittedly a general deposit, title to which money passed to the bank. On the day the bank closed and when the form of appellant's claim was changed to that of a certificate of deposit for a portion of her account, no money whatsoever was deposited. Obviously, it is contended, no new assets to the bank were added and no additional \$847.50 was received by the bank and hence no fund of that amount was ever added to the assets of the bank or ever reached the hands of the receiver. That the claimant of a trust fund must trace and identify his property in order to establish a preference is stated as a proposition established and fully demonstrated in *Cavin v. Gleason*, 105 N. Y. 256,

[11 N. E. 504]. Other cases are cited to the proposition. (See, also, note in 86 Am. St. Rep. 775.)

Appellant relies on two cases which she claims controvert the proposition just stated and also sustain her right to recover in this action. One of these is *People v. City Bank*, 96 N. Y. 32, and the other is *Stoller v. Coates*, 88 Mo. 516. In the New York case, the firm of Hartwell, Hough & Ford had a deposit in the City Bank of Rochester. It gave the bank certain checks drawn against its account in that bank, to be applied in payment of certain notes discounted by the bank. The opinion states that "the checks of the petitioner were money assets in the hands of the bank, and were so treated by all of the parties; they were delivered to it *with specific directions to apply the proceeds on payment of the notes*; those directions were assented to by the bank officer and the checks collected from that fund. From that moment the bank was bound to hold the money for, and apply it to that purpose, and no other, or failing to do so, return it to the petitioner. As to it the bank was bailee, or trustee, but never owner"; and it was held that the notes should be paid out of the assets in the hands of the receiver. Here was a clear agreement by the bank to apply the proceeds of the checks to a specific purpose. In the present case we find no such agreement.

In a subsequent case, *Cavin v. Gleason*, 105 N. Y. 256, [11 N. E. 504], speaking of *People v. City Bank of Rochester*, 96 N. Y. 32, it was said that the court in that case "did not decide that the petitioner would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver."

Stoller v. Coates, 88 Mo. 516, is cited as illustrating a transaction substantially the same as the one here. One Earnest, of Colorado, consigned to plaintiff, under the firm name of Stoller & Hill, of Kansas City, ten car loads of cattle, to be sold for his account. Stoller & Hill were requested, by instructions accompanying the consignment, to deposit the proceeds of sale in the Exchange Bank of Colorado, to his, the assignor's credit. The gross proceeds amounted to \$3,769.75, in the form of a draft. Stoller & Hill took the draft to the Mastin Bank for the purpose of carrying out their instructions. The net proceeds due the consignor were a little

less than the draft. They deposited the draft to their credit and immediately drew a check for the net proceeds to be transmitted to the consignor in Colorado. With the check they requested the bank to place the proceeds in the Exchange Bank of Denver, in Colorado, to the credit of Mr. Earnest, the consignor. The Mastin Bank agreed to do this. The Mastin Bank failed before the money was paid and it was held that a special deposit was constituted. The court said: "When Stoller & Hill drew their check for \$3,757.56, on the Mastin Bank and delivered the same to the bank, payable to the bank or indorsed over to it, they placed a specific fund in the hands of the bank. The bank was also advised sufficiently that Mr. Earnest was the ultimate owner or beneficiary of the fund. *The bank agreed to transmit this fund to the Exchange Bank of Denver, to be received by said bank for the use of Earnest.*" There was not only in that case a deposit of what was treated as money at the moment of drawing the check, but an agreement of the bank to transmit the fund. Both of these features are wanting in the present case.

It was perhaps not necessary for the Aitkens to enact the idle and useless ceremony of receiving the money on their check and immediately passing it back to the bank in order to have impressed the fund with a trust and to have made the bank the agent of Mrs. White for the transmission of the money. (*British etc. Co. v. Massey*, 63 Iowa, 468, 471, [19 N. W. 319].) But they should at least have clearly placed the responsibility upon the bank of remitting the money, as was done in the Missouri case, in order to constitute it a specific fund in its hands.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 6, 1914.

Beatty, C. J., dissented from the order denying a rehearing in the supreme court and filed the following opinion thereon:

BEATTY, C. J.—I dissent from the order denying a rehearing, not because I am convinced that the judgment of the

district court of appeal is erroneous, but because the question involved is a new one in this state, upon which the authorities in other jurisdictions are not in harmony; and more particularly because the case is not, as stated in the opinion of the appellate court "simply that of a depositor desiring to have a portion of her deposit remitted to her at a distant place." The transaction was in fact of a radically different character. The certificate of deposit was not an ordinary certificate of deposit importing the ordinary relation between the bank and the holder of the certificate. Mrs. White did not make the deposit either by herself or an agent. Aitken & Aitken had been her agents for the settlement of certain claims against her, but the money furnished them for that purpose had been deposited to their credit and they had become her *debtors* for the balance remaining after deducting the amount of the claims paid and the value of their services. When an agent is accounting to his principal and paying over the balance due his principal he is not acting in the character of agent, but in that of a debtor paying his creditor—and such was the transaction here. Not only was that the real transaction, but it was precisely in the character of a debtor to Mrs. White that Mr. Aitken presented the matter to the bank. He made no pretense of agency. All he asked was that the bank should accommodate him by paying \$847.50 of his money to Mrs. White at Tacoma. By drawing and delivering his check in favor of the bank on his account he gave the bank that amount of his money—and the agreement of the bank was that Mrs. White, a stranger to the transaction, should get the money. The failure to pay her was a violation of its agreement with Aitken & Aitken, acting for themselves—not acting for her.

Whether this view of the case would alter the result I am not prepared to say, not having had the time to examine the numerous authorities cited in the opinion and briefs of counsel, but I am convinced that it would render inapplicable many of the authorities cited in the opinion as to the rights of the holder of an ordinary certificate of deposit.

In a case so novel and important, and so easily distinguishable from the ordinary transaction to which it has been likened, I think further consideration is due.

[Civ. No. 1404. Second Appellate District.—November 10, 1913.]

J. G. WINSTON, Respondent, v. THE IDAHO HARDWOOD COMPANY (a Corporation), Appellant.

FOREIGN CORPORATION—FAILURE TO FILE ARTICLES OF INCORPORATION—

RIGHT TO DEFEND ACTION.—The failure of a foreign corporation doing business in this state to file a certified copy of its articles of incorporation in the office of the secretary of state, as required by sections 408 and 409 of the Civil Code, renders it subject to a fine, and deprives it of the right to maintain any action in any of the courts of this state, but does not prevent it from defending any such action brought against it.

ID.—DESIGNATION OF PERSON ON WHOM TO SERVE PROCESS—TIME FOR

FILING.—Such corporation is not required to file a designation of some person residing in this state upon whom process may be served, as provided by section 405 of the Civil Code, until the time of the filing of a certified copy of its articles of incorporation in the office of the secretary of state, and in the absence of proof of the filing of such a certified copy, such time has not arrived and no duty devolves upon it to file such designation.

ID.—SERVICE OF SUMMONS ON SECRETARY OF STATE.—In an action against

such corporation service of summons on the secretary of state is unauthorized, if it is not alleged in the complaint or otherwise shown that the defendant has failed to comply with the provisions of sections 408 and 409 of the Civil Code requiring such a corporation to file a certified copy of its articles of incorporation in the office of the secretary of state, but it is simply recited in the return of service of the summons that the defendant has not designated any person residing in the state upon whom process can be served.

ID.—DEFAULT JUDGMENT—POWER OF CLERK TO ENTER.—In such case

the clerk of the court is without authority to enter a judgment by default against the corporation.

ID.—APPEAL—DENIAL OF MOTION TO DISMISS.—A motion to dismiss an

appeal from such judgment, on the ground of failure to file a copy of the articles of incorporation and a designation of some person on whom to serve process, is properly denied.

ID.—FAILURE TO FILE ARTICLES OR DESIGNATE PERSON ON WHOM TO

SERVE PROCESS.—The failure to file a copy of its articles of incorporation, as required by sections 408 and 409, renders a foreign corporation subject to the penalties imposed by the provisions of section 410, but the denial of the right of such corporation to defend an action, as provided in section 406, attaches only when it fails to designate an agent in the state upon whom service may be made,

and the duty of filing such designation arises only at the time of filing the copy of the articles of incorporation, which in this case was never filed.

APPEAL from a judgment by default of the Superior Court of Kern County.

The facts are stated in the opinion of the court.

H. G. Redwine, for Appellant.

S. Wyman Smith, for Respondent.

SHAW, J.—Defendant appeals from a judgment by default entered against it.

The verified complaint alleged that at all the times mentioned defendant was a corporation created under the laws of Idaho; that plaintiff was employed by defendant as general manager of its property, consisting of certain real estate therein described, situate in Kern County California; that plaintiff on the nineteenth day of February, 1911, entered upon his duties as such general manager and continued therein until October 1, 1912. Followed by allegations as to the salary agreed to be paid plaintiff by defendant, a demand therefor and nonpayment. While there is no direct allegation that defendant was doing business in this state, respondent contends that such inference necessarily follows from the allegation that defendant employed plaintiff as general manager of its real estate. It is not alleged that defendant failed to comply with the provisions of sections 408 and 409 of the Civil Code, whereby every corporation organized under the laws of another state and doing business in this state is required to file in the office of the secretary of state of the state of California a certified copy of its articles of incorporation, or that defendant had failed to designate a person upon whom service of process issued against it could be served. The record discloses that the sheriff of Sacramento County, to whom the summons was delivered for service, certified that he "personally served the same on the 23d day of December, 1912, on the defendant, the Idaho Hardwood Company, a foreign corporation doing business in the state of California, by delivering to and leaving with Frank H. Corey, chief

deputy for Frank C. Jordan, the secretary of the state of California, in the said county of Sacramento, a true copy of said summons, together with a copy of the complaint in said action referred to in said summons." He further certified that defendant had not designated any person residing in the state of California upon whom process could be served. At the expiration of thirty days from the date of this service, defendant's default was entered, followed on the same day by a judgment entered by the clerk of the court in accordance with the prayer of the complaint. The contention of respondent is that his complaint shows that defendant was a foreign corporation doing business in this state, and that the sheriff's return of service of summons shows that defendant had not designated any person in the state upon whom service of process issued against it could be made, and hence the service of the summons upon the secretary of state was sufficient, under sections 405 and 406 of the Civil Code, to give the court jurisdiction of defendant. Assuming that defendant neglected to comply with the provisions of sections 408 and 409, requiring it to file a certified copy of its articles of incorporation, the only penalty fixed therefor is found in section 410 of the Civil Code, under which it is subjected to a fine of not less than five hundred dollars, in addition to which penalty it is deprived of the right to *maintain* any suit or action in any of the courts of this state. Under the provisions of this section defendant, by reason of its failure to file the certified copy of its articles, could not invoke the aid of the courts of the state in *maintaining* an action, but there is nothing in the section prohibiting it, by reason of such failure, from defending an action when called into court to answer. (*American etc. Wireless v. Superior Court*, 153 Cal. 533, [126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15].) Nor is there anything in section 405 of the Civil Code which, under the circumstances here shown, authorized the service of process issued against defendant upon the secretary of state. By that section, "every corporation other than those created by or under the laws of this state must, at the time of filing the certified copy of its articles of incorporation, file in the office of the secretary of state a designation of some person residing within the state upon whom process . . . may be served." Not until "*the time of filing the certified copy*"

was defendant required to make the designation, and, in the absence of proof that it had filed the certified copy, such time had not arrived and no duty devolved upon it to file such designation. "A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes." (*American etc. Wireless v. Superior Court*, 153 Cal. 533, [126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117, 96 Pac. 15].) There are no allegations in the complaint of any facts which would authorize the service of summons upon the corporation by delivering it to the secretary of state; nor was there, as shown by the record, any competent proof of the existence of such facts offered at the trial.

As stated, the judgment was rendered, not by the court, but by the clerk. The contention of respondent is that, since the action was one arising upon contract for the recovery of money only, and no answer having been filed with the clerk within the time specified in the summons, it became the duty of the clerk to enter judgment for the amount demanded in the prayer of the complaint. (Code Civ. Proc., sec. 585, subd. 1.) In *Olender v. Crystalline Mining Co.*, 149 Cal. 482, [86 Pac. 1082], it is said that the sections herein quoted, consisting of a codification of the act of March 17, 1899, substituted the service upon the secretary of state for the service by publication formerly prescribed by the code in cases where the corporation had no agent in the state. This being true, under subdivision 3 of section 585 of the Code of Civil Procedure, it is made the duty of the court to examine the plaintiff under oath for the purpose of determining the amount which he is entitled to recover and render judgment therefor. Our conclusion is that no facts were alleged or established under which defendant could be brought into court by service of the process upon the secretary of state, and that, conceding the service to have been regular, as claimed by respondent, the clerk had no power to render the judgment.

Pursuant to notice, respondent at the time of the hearing of the appeal moved to dismiss the same upon the ground that defendant was not entitled to a hearing for "the reason that

it has not filed a certified copy of its articles of incorporation in the office of the secretary of state of the state of California, nor . . . filed in the office of the secretary of state of the state of California, a designation of some person residing in the state upon whom process should be served for and in behalf of the said corporation issued by authority of or under any law of this state." In support of his motion respondent presented the transcript on appeal and a certificate from the secretary of state to the effect that defendant had not, prior to August 20, 1913, filed a certified copy of its articles of incorporation in the office of secretary of state of California, nor designated any person residing in the state upon whom process against it could be served. As we have seen, the only penalty which attached to the failure to file the certified copy of its articles, as provided in section 410 of the Civil Code, was the imposition of a fine of five hundred dollars and the denial to it of the right to *maintain* an action; and since, under said section 405, defendant was not required to file its designation of a person upon whom process might be served other than *at the time of filing such copy*, there was no want of compliance with the duty imposed upon defendant by said section 405. Hence, the provisions of section 406 of the Civil Code, which deny to a foreign corporation doing business in this state the right to "maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section," have no application to the facts here shown. Failure to file the copy of its articles of incorporation, as required by sections 408 and 409, rendered it subject to the penalties imposed by the provisions of section 410, but the denial of the right of a foreign corporation to defend, as provided in section 406, attaches only when it fails to designate an agent in the state upon whom service may be made, and the duty of filing such designation arises only at the time of filing the copy of the articles of incorporation, which, as we have seen, in this case were never filed.

The motion to dismiss is therefore denied, and the judgment appealed from is reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1174. Third Appellate District.—November 11, 1913.]

MERCHANTS COLLECTION AGENCY (a Corporation),
Respondent, v. **MILOS M. GOPCEVIC,** Appellant.

PLEADING—AMENDMENT OF COMPLAINT—STATUTE OF LIMITATIONS.—A complaint in an action to recover for medical services, which declares on an express contract and alleges facts sufficient to sustain a *quantum meruit*, may be amended, over two years after it was filed, by amplifying the count on the express contract and adding another count on the *quantum meruit* for the reasonable value of the services. Such an amendment is not the substitution of a new cause of action so as to continue the running of the statute of limitations until its filing.

ID.—AMENDMENT OF COMPLAINT—INTRODUCTION OF NEW CAUSE OF ACTION.—Where a complaint contains all the essential facts of a *quantum meruit*, the more formal and elaborate statement of them thereafter in a separate count in an amended complaint cannot be construed as the introduction of an entirely new cause of action.

ID.—COMMON COUNTS—WHETHER PERMISSIBLE.—The common counts may be used to state a cause of action, notwithstanding the provision of section 426 of the Code of Civil Procedure that a complaint must state the facts constituting the cause of action in ordinary and concise language.

ID.—ACTION FOR MEDICAL SERVICES—EVIDENCE OF REASONABLE VALUE.—In this action to recover for medical services, the evidence supports a judgment in favor of the plaintiff for their reasonable value.

ID.—INTEREST—ALLOWANCE ON UNLIQUIDATED CLAIM BEFORE JUDGMENT.—In an action on an implied contract to pay the reasonable value of services, interest is not allowable before judgment; and if such allowance is made, the judgment will be modified to that extent on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

John F. Davis, Charles S. Wheeler, J. F. Bowie, and W. S. Andrews, for Appellant.

E. H. Wakeman, for Respondent.

BURNETT, J.—The appeal is from a judgment on an assigned claim in favor of plaintiff for the sum of four hun-

dred and eighty dollars with interest in the sum of \$125.55. We may adopt the following statement of the proceedings as made by appellant:

"The original complaint was filed on October 13, 1908, and contained but one count. . . . Afterwards the said superior court, over the objection of appellant, made an order, duly excepted to by appellant, permitting the respondent to file an amended complaint, and this amended complaint was filed on June 5, 1911. The amended complaint contained two counts: the first though somewhat amplified was the same count based upon an *express contract* as set forth in the original complaint; the second was an ordinary *quantum meruit* count for the reasonable value of the alleged professional services. Appellant pleaded the statute of limitations to both counts by demurrer and answer and also invoked that statute in his motion for a nonsuit. The court overruled the demurrer, denied the motion for nonsuit and in its findings of fact determined that neither count was barred by the statute of limitations, although the second count on *quantum meruit* was not filed until more than two years after the filing of the original complaint. The court further found that no *express contract* had been made by appellant and respondent's assignor, but it gave respondent judgment for the reasonable value of said services, together with interest thereon from October 13, 1908."

Appellant presents three contentions, as follows: "1. That the second count or cause of action set up in the amended complaint was barred by subdivision 1 of section 339 and subdivision 2 of section 337 of the Code of Civil Procedure. 2. That the evidence is insufficient to justify the finding that Milos M. Gopcevic promised to pay to Walter H. Fearn, respondent's assignor, the reasonable value of the professional services rendered by him. 3. That the lower court erred in granting interest from October 13, 1908, the date of filing the original complaint, upon the sum awarded to respondent as the reasonable value of the professional services rendered by respondent's assignor."

The first proposition is based upon the assumption that the second counts sets forth an entirely different cause of action from that contained in the original complaint, as it is not contended that when the action was brought it was barred by any

statute of limitations. It is argued that according to the original complaint the plaintiff's primary right arose out of the alleged express agreement between the assignor and the defendant and that this is "entirely different and distinct from an obligation implied by law or even from an express agreement to pay the reasonable value of services rendered at another's request."

Decisions from other jurisdictions are cited in support of this view, among which is *Meinshausen v. A. Gettelman Brewing Co.*, 133 Wis. 95, [13 L. R. A. (N. S.) 250, 113 N. W. 408], containing the following declaration: "We must hold that the cause of action in *quantum meruit* was separate and independent from the cause of action on express contract, and that no action was commenced on *quantum meruit* until the filing of the amended complaint, at which time that cause of action was barred by the statute of limitations."

But we need not go into other states, as we have the point decided by our supreme court in direct opposition to appellant's contention. The case is the familiar one of *Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100], wherein it is held that "A complaint in an action for breach of contract, which as originally framed seeks to recover the contract price of services performed by the plaintiff in pursuance of the contract, together with profits which he would have made, on the ground that he had been technically 'prevented' from completing the contract by the defendant, may be amended so as to aver a claim for the value of the services actually done as upon a *quantum meruit*. Such an amendment is not the substitution of a new cause of action so as to continue the running of the statute of limitations until its filing."

Appellant attempts to make a distinction between that case and this upon the ground that in the former, "though the general frame of the early complaints showed that the pleader was suing on the express contract, the facts alleged in these complaints were sufficient under the liberal principle of code pleading to sustain a *quantum meruit*." We cannot agree with the opinion of the able counsel for appellant, as we are satisfied that the distinction does not exist. In the original complaint here the facts alleged "*were sufficient under the liberal principle of code pleading to sustain a quantum*

meruit." They may not be set forth with equal precision or proportionate elaboration to the Cox case but, of course, the question is not one of rhetoric. Indeed, having before us all the eight complaints in the Cox case, we think it is quite apparent that the pleader in each indulged in much unnecessary and redundant detail.

The essential point is that all the facts required to support a judgment on *quantum meruit* are found in the complaint filed in this case October 13, 1908. The substantive averment material here is: "That within two years next immediately preceding the commencement of this action, defendant became and was indebted to said Walter H. Fearn in the amount of \$6,962.50 for and on account of professional services rendered by said Walter H. Fearn at the special instance and request of defendant herein at a stipulated and agreed rate and price, which said rate and price said defendant promised to pay to said Walter H. Fearn."

We have thus a sufficient statement of *quantum meruit* and the additional averment of an express promise to pay a certain amount. The complaint, in other words, would support a judgment on either of the theories mentioned. That the two theories were not set forth in separate counts is of no consequence as far as the question before us is concerned.

That all the necessary elements of a *quantum meruit* are exhibited in the original complaint follows from a consideration of *McFarland v. Holcomb*, 123 Cal. 84, [55 Pac. 761]. In that case the complaint alleged: "That William A. Holcomb was at the time of his death indebted to the plaintiff in the sum of seven thousand four hundred dollars as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising and taking care of the said William A. Holcomb almost continuously from the twenty-ninth day of November, 1870, down to the fourth day of November, 1895, in the city and county of San Francisco, state of California." The court held that the complaint was sufficient and not obnoxious even to special demurrer for uncertainty. It was declared that "Under our system of pleading, when only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or promise, when they are implied as a legal conclusion from the facts which are alleged," and further: "In the present case the

nursing of the decedent by the plaintiff, and his acceptance from her of his board and lodging during the time specified, was a consideration sufficient to support the promise for compensation therefor which is implied in law, and to render him liable therefor." The promise implied by the law is, of course, to pay the reasonable value of the services. The complaint therein was therefore one in implied *assumpsit* and was emphatically approved by the supreme court. In the original complaint here we have the same common count but with the unnecessary additional allegation that the services were performed at *the special instance and request* of defendant.

Appellant attaches some significance to the fact that the simple rule of the code as to pleadings (Code Civ. Proc., sec. 426) was not observed in framing the original complaint, but it cannot be controverted that the common counts are not at all inconsistent with said rule. "It was held in this state at an early day, and has since been repeatedly held, that the common counts may be used to state a cause of action, notwithstanding the provision referred to, which was found in the old statute and was adopted into the code." (*Pleasant v. Samuels*, 114 Cal. 37, [45 Pac. 998], and cases cited.)

The original complaint containing, thus, all the essential facts of a *quantum meruit*, the more formal and elaborate statement of them thereafter in a separate count could not possibly be construed as the introduction of an entirely new cause of action.

As to the evidence, it may be said that the record is quite brief. The inference from Dr. Fearn's testimony is that the services were performed under an express agreement with appellant for the payment of ten dollars an hour. Appellant testified: "I never employed Walter H. Fearn to perform medical services for or on behalf of my brother, Peter Gopcevic, or for any other purposes or at all. I never promised to pay said Walter H. Fearn the sum of \$10 per hour, or any other sum, nor did I promise to pay him the reasonable value thereof."

The court adopted the view that the services were performed for appellant but it rejected the theory of an express promise to pay ten dollars an hour or two hundred and forty dollars a day. Of course, any conscientious judge would

require the most convincing evidence of such contract before he would allow an enormous charge like that. Nor is it likely that he would hold \$6,960 to be a reasonable charge for the services, even of a physician, for twenty-nine days. Nine hundred dollars seems much more consonant with just and fair dealing. As to the point that there is no evidence to sustain this finding, it is sufficient to say that there is no specification that the evidence was insufficient to show the value of the services. This probably accounts for any deficiency of the bill of exceptions in that respect, it not purporting to contain all the evidence.

But it is not correct to say that there is no evidence of the value of the services. Dr. Fearn testified that "detention fees were \$10.00 an hour" and that, in response to appellant's statement: "I want you to stay right here and not go away," he replied: "Mr. Gopcevic, that is a very expensive proposition. The lowest charge I can make according to the fee bill is \$10 per hour for detention." It is, of course, a fair presumption that the fee bill is an expression of the opinion of the profession that such services are worth that amount. It would be at least a legal inference from the doctor's testimony that his services were worth ten dollars an hour. This would manifestly support the finding of a less amount, to wit, the sum of nearly \$1.30 per hour.

We find merit in the third point made by appellant. The court's conclusion being based upon an implied contract it was not proper, under the decisions, to allow interest before judgment. (*Cox v. McLaughlin*, 76 Cal. 60, [9 Am. St. Rep. 164, 18 Pac. 100]; *Erickson v. Stockton & Tuolumne Railroad Co.*, 148 Cal. 206, [82 Pac. 961]; *Farnham v. California etc. Trust Co.*, 8 Cal. App. 266, [96 Pac. 788]; *American Hawaiian etc. Co. v. Butler*, 17 Cal. App. 764, [122 Pac. 709].) A new trial, however, is not required for this reason.

The judgment is modified by striking therefrom the sum of \$125.55 for interest and, as thus modified, the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1166. Third Appellate District.—November 11, 1913.]

OTIS F. JOHNSON, Respondent, v. RELIANCE AUTOMOBILE COMPANY (a Corporation), Appellant.

NEGLIGENCE—AUTOMOBILE RACE—INJURY TO SPECTATOR—EVIDENCE.—In this action to recover for personal injuries sustained by a spectator at an automobile race by being struck by one of the cars as it swerved from its course on the breaking of the steering knuckle, the evidence does not establish that the car was entered in the race by authority of the defendant corporation, or that the driver was its agent or employee, or that he was negligent in managing the car.

ID.—AUTHORITY OF SECRETARY OF CORPORATION TO ENTER AUTOMOBILE IN RACE.—The secretary of a corporation engaged in selling automobiles has no authority, as such, to use its name in entering cars in races and thereby render it liable for the consequences thereof.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. F. B. Ogden, Judge.

The facts are stated in the opinion of the court.

Lewis F. Byington, for Appellant.

Austin Lewis, and R. M. Royce, for Respondent.

CHIPMAN, P. J.—Action for personal injury. The charging part of plaintiff's amended complaint is as follows:

"That on the 23d day of October, 1909, plaintiff was in an orchard known as Stanley orchard, Stanley Road near San Leandro, in the county of Alameda, state of California, and was then and there watching the course of the automobile race hereinafter mentioned, which said race was then being held and conducted. That the said orchard marched (sic) upon the highway hereinafter mentioned.

"That on the said date defendant corporation was the owner and in the possession of a certain Knox automobile, and had entered the said Knox automobile for the Oakland Portola automobile race, the said Knox automobile being numbered as eleven (11) in the said race and was entered for events one (1) and three (3) and the driver of said automobile was Frank Free.

“That during the progress of the said race when the said automobile arrived at a position on the highway opposite to the orchard in which plaintiff was standing, the said Frank Free carelessly and negligently turned the said automobile off the said road and ran it into the said orchard where it knocked down a tree in its course and thereafter ran into and knocked down plaintiff herein, and inflicting upon him the injuries hereinafter set forth.”

It is further alleged that the Frank Free above mentioned was, in the original complaint, made a defendant but is not so made in the amended complaint, but that, at the time of the accident, he was “an agent, servant and employee of said defendant corporation, and during all the times herein mentioned acted within the scope of his said employment.”

The answer is a specific denial of the material averments of the amended complaint and alleges “that plaintiff was negligent and careless, and assumed risks and hazards, together with the dangers arising therefrom, in and about the alleged matters in said complaint referred to, which negligence and carelessness and risks and hazards proximately contributed to and caused his alleged injury and damage.”

At the close of plaintiff's testimony and also at the close of the evidence in the case defendant's motion for nonsuit was denied. The cause was submitted to the jury and plaintiff had the verdict.

Defendant appeals from the judgment on the verdict and from the order denying its motion for a new trial.

The facts in the case appear almost entirely from the testimony of witnesses called by the plaintiff.

It appears that, on October 23, 1909, an automobile race for speed and endurance was arranged to take place along what is known as the Foothill Boulevard, between San Leandro and the city of Oakland, the cars traveling westerly toward Oakland. The event had been widely advertised and drew a large number of people. Among them was plaintiff in company with a young lady. They went at first to an elevated point to witness the race, safe from any possible danger, reaching the place about eight o'clock in the morning. They remained there until about one o'clock and, as was explained, they took a position two or three hundred feet from this first position, in an orchard bordering the boulevard, where

they would be protected from the sun by the shade of the trees. This point was about fifty or sixty feet from the boulevard and at the second row of fruit trees. There was no fence at the roadside and the only obstruction was the curb of the paved street. At the point chosen the road made a curve toward where they were standing and gave them a view of the cars as they approached the curve and also at the curve and as the cars left it speeding westward. What happened will best be stated by the witnesses. Plaintiff testified: "The last I remember we had just gotten up from sitting under a tree. It was warm that time in the day, being about one o'clock and that being the only shade around the course and we would get up every time the car came around so we could see, see it make the curve and we had just gotten up when this car made the curve, and that is the last I remember. . . . After we got up I remember seeing the car come towards the curve; and I remember there was something wrong, and that is the last I remember. . . . I judge there were 50 or 60 people in that particular part of the orchard. They were watching the race." Mrs. Johnson, who became plaintiff's wife after the accident, testified: "We were watching the automobiles make the curve, and one of them came around the curve and swerved towards where we were standing. Ran over the curb into the orchard and struck Mr. Johnson. It just grazed past me." Witness Adams testified: "I was about 400 or 500 feet westerly from the scene of the accident. I saw the car when it was at the curve swerve from the road and go into the orchard. I saw the young man start to run. I thought he ran about 25 feet when he was struck by the automobile. I believe the car was going along the road about 60 miles an hour."

Witness Henderson was on horseback on the Stanley road, leading across the boulevard, not far from plaintiff's position. He testified: "There is a curve beyond the Stanley orchard to the east, and from the orchard I could see the cars turn the curve and dash up towards the orchard. . . . It is about the lowest place along the boulevard. . . . If the automobile went straight ahead at that point it would hit the Stanley road, about the intersection there. The man was trying to turn on the curve and it turned some and started to skid, it seemed to be skidding. He was too close to the curb and he seemed

to be afraid to strike it broadside and turned into it. I think it passed partially around the curve then. It seemed to be skidding. If he had hit the curb broadside the way he was going he would have turned over. I mean the curb on the hill side, the orchard side. He tried to turn to the left. I saw him give an effort at the wheel. It seemed to me the automobile passed over Johnson." Witness Frank Free, called by plaintiff, testified: "I am an automobile driver. October 23, 1909, I was driving a Knox car, number 11, in the Portola race in Alameda County. That car ran into this orchard and hit Mr. Johnson." Mr. Royce (counsel for plaintiff): "Q. Before the car left the road the steering pin broke, did it not? A. Yes, sir. The Court: Q. Did you enter it in the race? A. Mr. Charles Richardson. Q. And who was Mr. Charles Richardson? A. As to that I could not say. . . . Q. And for whom were you running it? A. Mr. Charles Richardson." He testified that he had driven the car in the "tryout"; brought it from the Reliance automobile garage on Van Ness Avenue; that he did not then know that Mr. Richardson was an officer of defendant company; that "he was told by the racing committee that Mr. Richardson attended to the details of entering the car"; that he did not know Mr. Crim, the president of the company; that his negotiations were all with Mr. Richardson by mail; that Mr. Richardson was the only man he had any conversation with about the car; the car "was shipped out from the Knox factory to run in this race. The Court: Q. Were you connected in any way with the Reliance Automobile Company? A. Just for the race, that's all. Q. How were you connected with the Reliance Automobile Company for this race? A. Well I was employed by Mr. Charles Richardson; whether he had anything to do with the Reliance Automobile Company, or with the Knox factory, I do not know. I had all my dealings with him. . . . I do not know who owned the Knox car at the time of the race. I do not know to whom it was shipped." Cross-examination. To Mr. Byington, attorney for defendant: "When the car reached the curve at the orchard the steering knuckle broke. It is an arm that fits in the spindle. . . . The steering knuckle is the part of the steering apparatus which connects the front axle with the steering gear. And that broke as I was making the turn

And when that broke I lost control of the car." . . . To Mr. Royce: "Q. You are a professional driver, are you not? A. Yes, sir. Q. In whose employ were you at the time of the race? A. Mr. Charles Richardson. Q. Did he pay you personally? A. Yes, sir. Q. Did he pay you in the name of the Reliance Automobile Company? A. He paid me in cash. I do not think I gave a receipt. I drew some money before the race. I think I was paid over here in Alameda County." To Mr. Byington: "When I reached the curve and the steering knuckle broke I lost all control over the car. . . . When the car reached this curve and the steering knuckle broke the car jumped over the curb and into the orchard. It plunged straight ahead. I at once threw on the brakes. The rear wheels were as near blocked as they could be. It was impossible to guide or direct the car around the curve. The car had been carefully examined by me and by a skilled mechanic before starting on the race, and every part of it found to be in good condition. The steering gear was not broken before it reached that curve. . . . If there was any defect in the steering knuckle it was something that could not be seen from external observation."

Witness Crim, president of the defendant company, testified for plaintiff: that his company was, at the time of the trial, agent for the Knox cars but he could not state whether it was such agent in 1909; that he did not attend the race and did not know of it; that he did not see the Knox car in their garage before the race—their salesrooms were at 342 Van Ness Avenue and their garage at 547 Fulton Street. "Q. Did your company enter this car? A. No sir. Q. Are you positive they did not enter it? A. Yes, sir. Q. Did you arrange any of the details of this race? A. No, sir. . . . I did not know that there was a car entered in the race in the name of the company. . . . I do not know of our company ever requesting the Knox factory to send a car out here to be entered in that race. . . . Q. Did Mr. Richardson have power to enter automobiles in races for the company? A. No sir. Mr. Royce: I think that is all." On cross examination: "The Reliance Automobile Company did not enter the Knox car in that race."

There was some testimony at this point that, in May, 1910, Mr. Austin Lewis, one of plaintiff's attorneys, wrote to Mr.

Crim soliciting an interview with regard to this accident. A meeting took place subsequently with Mr. Lewis at which Mr. Crim said that Richardson was secretary and treasurer of defendant company and "had charge of the stores but had no power to enter automobiles in races." Mr. Lewis testified that at the interview he showed Mr. Crim a program of the Portola race which read: "Car number 11; entered events 1 and 3; name of car Knox; piston displacement 373.06; entrant Reliance Auto Co.; driver Free; mechanic Robinson." On objection of defendant, the court ruled that "you have no right to introduce this document in evidence except as a part of a conversation, and it does not prove the facts which the entry itself may state." Mr. Lewis testified that he showed Mr. Crim this document and he replied that "he would have to consult his stockholders before taking any action in the matter." "The Court: Q. What, if anything, did he say in reference to the entry of the car by the Reliance Automobile Company? A. No discussion was had with regard to the entry for the automobile company." Mr. Royce, still later, saw Mr. Crim "in regard to a proposed compromise of this action." He testified: "I spoke to Mr. Crim and asked him about that compromise we were suggesting. He said, 'Well, I have seen the stockholders, and we have decided not to accept.' And I said, 'What's the matter; the compromise is reasonable enough.' 'Well,' he said, 'you ask too much.' That is about all."

Witness Richardson, called by plaintiff, testified that he was the secretary and treasurer of defendant company on October 23, 1909; and "there is no such office as manager of the company." He was asked who gave the committee in charge of the race the information for entering the car and answered: "I did." Mr. Royce: "Q. Did you see the entry made when you were there? A. Yes, sir. To the best of my recollection, I think the entry was made in the name of the Reliance Automobile Company. The Reliance Automobile Company was engaged in the automobile business in San Francisco." To Mr. Byington: "I personally entered the car in the race." Plaintiff rested. A motion for nonsuit, on grounds hereinafter stated, was made and taken under advisement and defendant ordered to proceed.

The testimony for defendant was substantially the same as given for plaintiff and explained a little more fully what appeared in the testimony for plaintiff. Witness Free described the Knox car and the examination made of it before the race and repeated his testimony as to the breaking of the steering knuckle. Witness Robinson was Free's mechanic and testified fully to the perfect condition of the car and to Free's skill as a driver; also to the breaking of the steering apparatus and loss of control of the car. Both he and Free examined the car after the accident and found the cause of the accident as they had testified.

Richardson testified as follows: "The Reliance Automobile Company never at any time authorized or directed the entry of the car driven by Mr. Free in the Portola road races, held October 23, 1909." To the Court: "It was the car of the Knox Automobile Company. It belonged to the Knox Automobile Company, and was returned to them. I asked the Knox factory to send it out to me for the purpose of the race. I negotiated with the company. I do not remember whether it was shipped to me or to the Reliance Automobile Company. I, personally, was acting for the Knox company, October 23, 1909, and not as a corporation. Our corporation was engaged in the business of selling automobiles. They did not sell Knox automobiles prior to October, 1909. The Reliance Automobile Company subsequently became agent for the Knox. The contract was signed, I believe, in December, 1909, or January, 1910. Q. And did the Reliance Automobile Company ever enter any car in any race of any kind? A. No, sir; it did not."

The record purported to contain all the evidence and we have given substantially all of it. At the close of defendant's evidence counsel renewed his motion for nonsuit on the grounds first stated, to wit: that plaintiff had failed to prove a sufficient case for the jury in that "plaintiff had failed to prove that defendant was the owner of, or in possession of, or had entered in any race, the automobile which caused the injury to plaintiff, or that Frank Free was the agent or employee of defendant, at the time mentioned in the complaint, and had failed to prove negligence on the part of defendant, but had proven negligence on the part of plaintiff contributing

to the injury and an assumption of risk on the part of plaintiff, resulting in plaintiff's injury."

We fail to discover any conflict in the evidence on the issues presented by the pleadings.

It is alleged in the amended complaint that the defendant "was the owner and in the possession of a certain Knox automobile, and had entered the said Knox automobile for the Oakland Portola automobile race." Also, that Frank Free, who drove the said machine, "was at all times herein mentioned an agent, servant and employee of said defendant corporation, and during all the times herein mentioned acted within the scope of his employment." It was incumbent upon plaintiff to establish these issues by a clear preponderance of evidence. The most that can be said of this evidence as to defendant's liability is—that Richardson, who at the time was secretary and treasurer of the defendant company, acting as an individual, arranged to enter the Knox car in the race; that he personally employed Free to drive it and paid him for his services. There is not any evidence that Richardson had any authority as secretary and treasurer to enter cars in races generally or in this particular race; on the contrary, the evidence is that he had no such authority and was not given any such authority in this instance; that defendant did not own the Knox car and was not the agent for its sale; that defendant had never entered any car for any race. It was not necessary to show absolute ownership in defendant; it would have been sufficient to charge it, if otherwise liable, had it been in possession and control of the car and had it entered for the race. But the proofs fall far short of showing such a state of facts. It is true that Richardson entered the car in the name of defendant company. But this was unknown to the defendant and was without its authority and it cannot be said as matter of law that he had any such authority by virtue of his office. Besides, his testimony was that he acted in his individual capacity. If we were at liberty, which we are not, to reject the evidence introduced by plaintiff, we should have to hold, in order to sustain the judgment, that the jury were justified in finding that Free was defendant's agent and was acting within the scope of his authority as such agent, and that this inference was justly derivable from the nature of the corporation and from Richardson's

relation to it as secretary and treasurer. All that the evidence discloses as to the business in which defendant was engaged is that it was selling automobiles. Richardson's duties as secretary are not shown nor are there shown any acts of his as such secretary, acquiesced in by the corporation, or any acts of the corporation itself from which an inference can be reasonably drawn that Free was driving the car in question under the authority, express or implied, of the corporation. We cannot say that the business of selling automobiles carries with it by implication the racing of automobiles in public meets of speed and endurance such as the Portola races here in question. Nor can we say that the secretary of a corporation engaged in selling automobiles has express or implied authority to use its name in entering cars and to render it liable for the consequences thereof. There can be no presumption that the secretary of a corporation is clothed with authority to do an unlawful act.

A further issue was raised by the complaint, to wit, that "the said Free carelessly and negligently turned said automobile off the said road and ran it into the said orchard and ran into and knocked down plaintiff inflicting the injuries" complained of. This is denied and it is alleged in the answer that "plaintiff was negligent and careless, and assumed risks and hazards, together with the dangers arising therefrom in and about the matters alleged in said complaint referred to, which proximately contributed to and caused his alleged injury and damage."

The evidence introduced by plaintiff shows, without substantial conflict, that the accident was not due to want of care or to the negligence of Free in driving the car. It had been thoroughly inspected by a competent mechanic and by Free himself, a skilled driver, who had driven it in the "try-outs," and was in perfect condition so far as could be detected. "When the car reached the curve at the orchard," mentioned in the evidence, "the steering knuckle broke. . . . The steering knuckle is the part of the steering apparatus which connects the front axle with the steering gear. And that broke as I was making the turn. And when that broke I lost control of the car as far as steering was concerned. . . . When the car reached this curve and the steering knuckle broke the car jumped over the curb and into the orchard. It

plunged straight ahead. I at once threw on the brakes. The rear wheels were as near blocked as they could be. It was impossible to guide or direct the car around the curve." This is the testimony of Free when called by the plaintiff and is confirmed by the observation of other witnesses. Plaintiff suggests in his brief that there were several theories as to what occurred, "one that the machine was driven too near the curb; that to avoid striking the curb Free turned off the road into the orchard and the steering knuckle broke when the car crossed the curb or afterwards in the orchard." This suggestion is based upon the testimony of witness Henderson which we have stated in connection with that of other witnesses. No such theory can reasonably be predicated of Henderson's testimony. What he observed is entirely consistent with the testimony of Free given as plaintiff's witness and of Robinson, who was on the car, and other witnesses. Henderson testified that Free "tried to turn to the left" which was away from the curb. There is no dispute of the fact that the steering knuckle broke when the car was on the curve and it is not unlikely that when that happened the car, to Henderson's observation, "seemed to be skidding." There is nothing in Henderson's testimony on which a theory can be based imputing negligence in Free's management of the car.

Upon this branch of the case the question presented is simply this: Where a person, as a spectator, voluntarily attends an automobile race, for speed and endurance, upon a public highway, and takes a reasonably safe position to witness the event, may he recover for an injury inflicted by one of the racing automobiles which did not result from want of care in its management by the driver, or from any known or visible defect in the car, but did result from the unavoidable breaking of some parts of the automobile? Defendant supports the negative of this position by decisions of courts of high repute. The view we have taken of the case makes it unnecessary to decide the point. We content ourselves with the citation of the cases which have been examined by us and appear to support defendant's contention: *Johnson v. City of New York*, 186 N. Y. 139, [116 Am. St. Rep. 545, 9 Ann. Cas. 824, 78 N. E. 715]; *Bogart v. City of New York*, 200 N. Y. 379, [20 Ann. Cas. 466, 93 N. E. 937]; *Heffern v. Village of Haverstraw* 143 App. Div. 527, [128 N. Y. Supp. 399];

Scanlon v. Wedger, 156 Mass. 462, [16 L. R. A. 395, 31 N. E. 642]; *Frost v. Josslyn*, 180 Mass. 389, 62 N. E. 469]; *Dowell v. Guthrie*, 99 Mo. 653, [17 Am. St. Rep. 598, 12 S. W. 900].

As we do not think there was any evidence tending to show that the car was entered in the race by the authority or with the sanction of defendant, our conclusion is that its liability is not proven.

The judgment and order are reversed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 10, 1914.

[Civ. No. 1402. Second Appellate District.—November 12, 1913.]

BONNIE ELOUISE McNUTT, as Executrix of the Will of
Cyrus F. McNutt, Deceased, et al., Appellants, v. ANTON
PABST et al., Respondents.

APPEAL—ABSENCE OF BRIEFS AND ORAL ARGUMENT—AFFIRMANCE.—

Where no oral argument is made nor brief filed on an appeal from a judgment and an order refusing a new trial, the appellate court will not assume the burden of investigating the merits of the appeal, but will affirm the judgment and order.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

Ben. Goodrich, for Appellants.

Geo. L. Keefer, for Respondents.

THE COURT.—In this cause the transcript on appeal was filed in this court on August 14, 1913. The cause was placed upon the regular calendar for oral argument and on the call of that calendar on October 28, 1913, it was ordered to be sub-

mitted, no appearance being made for oral argument by counsel for appellants or respondents. No briefs have been filed and the time within which the same are permitted to be filed under the rules of court has long since expired and no order extending the time for such purpose has been asked for or made. Under such conditions an appellate court is not called upon to examine the transcript in search of errors upon which to order a reversal. The presumption is that the order denying a new trial and the judgment were properly made and entered. While rule V governing procedure upon appeal in the supreme court and in this court provides that an appeal may be dismissed, upon notice, for failure to file the transcript or appellant's points and authorities; even though no such motion be urged on behalf of respondent, as here, the court will nevertheless not assume the burden of investigating the merits of the appeal where the same is not supported by any argument, oral or printed.

The judgment and order are, therefore, affirmed.

[Civ. No. 1159. Third Appellate District—November 12, 1913.]

JULIUS F. H. HEIM et al., Respondents, v. FRED T. MOONEY et al., Appellants.

PRINCIPAL AND SURETY—BOND OF RECEIVER—CONCLUSIVENESS OF JUDGMENT OF DISMISSAL.—Where the plaintiff in an action for an injunction procures the appointment of a receiver as ancillary thereto, and subsequently has the action dismissed, the judgment of dismissal is conclusive against the sureties on the bond of the receiver that his appointment was wrongful or without sufficient cause, and they become liable for damages resulting to the defendant from the receivership.

APPEAL from a judgment of the Superior Court of Napa County and from an order refusing a new trial. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Theodore A. Bell, for Appellants.

Vogelsang & Brown, and John T. York, for Respondents.

CHIPMAN, P. J.—This is an action on a receiver's bond. Plaintiffs had judgment, from which and from the order denying their motion for a new trial defendants appeal.

One John S. Noble commenced an action for an injunction, in the superior court of Napa County, against the plaintiffs in this action, wherein he sought to procure the appointment of a receiver *pendente lite*, to take and retain exclusive possession of certain real and personal property at the time used in the furniture and undertaking business by and in the possession of and belonging to them. The court appointed a receiver in the action on Noble's *ex parte* application upon filing a statutory bond in the sum of ten thousand dollars, executed by Noble as principal and the defendants in this action, Mooney and Davis, as sureties. Thereupon, the receiver entered upon the discharge of his duties and took possession of all the property involved, excluding the plaintiffs herein therefrom. Later on the court required a further bond of five thousand dollars to be given and it was executed by the same principal and sureties and was filed in the action. Subsequently, the defendants in that action (plaintiffs herein) gave notice of a motion to vacate and annul the order so appointing the receiver, accompanied by certain affidavits. Before the date set for the hearing of said motion, Noble, plaintiff in said action, voluntarily dismissed his action and caused a judgment of dismissal to be entered therein. The present suit followed to recover damages sustained by reason of the appointment of the receiver.

The court found that plaintiffs had been damaged in the sum of \$1,105.80. No question arises as to the sufficiency of the evidence to sustain this finding. The court also found that Noble, in his said action, "did wrongfully and without sufficient cause procure the appointment of said receiver and his continuance in office in said action."

The judgment of dismissal of said action was as follows:

"JUDGMENT OF DISMISSAL.

("Title of Court and Cause.)

"The plaintiff herein having made an order for the dismissal of the above entitled action and the clerk having made an entry of dismissal thereof in his Register of Actions,

"Therefore, by virtue of the law and by reason of the premises aforesaid (no trial in said case having been had),

"It is ordered, adjudged and decreed that the above entitled case be and the same is hereby dismissed.

"Judgment entered April 11th, A. D. 1907.

(Seal)

"N. W. COLLINS,

"Clerk of the Superior Court.

"Clerk's office of the Superior Court, in and for the County of Napa, State of California."

(Endorsed) "Filed April 11th, 1907."

At the trial defendants offered to prove the facts set out in the complaint and amended complaint in the action brought by Noble against the plaintiffs herein. The court sustained the objection of plaintiffs to such evidence and there was no evidence introduced by either plaintiffs or defendants in support of the averment of the complaint and the finding of the court that the appointment of the receiver was procured wrongfully or without sufficient cause, except the said judgment of dismissal hereinbefore set forth.

Appellants assigned as error the insufficiency of the evidence to show that the appointment of the said receiver was procured wrongfully or without sufficient cause. This presents the sole question in the case.

Section 566 of the Code of Civil Procedure provides, among other things, as follows: "If a receiver is appointed upon an *ex parte* application, the court . . . must require from the applicant an undertaking with sufficient sureties, . . . to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause. . . ."

No case is cited and we have found none where the action was on a receiver's bond after dismissal by the plaintiff of the action in which the bond was given. The question is, Did the dismissal of the action against the plaintiffs by Noble have the effect to finally decide that the appointment of the receiver was procured wrongfully or without sufficient cause? In the absence of an adjudication of the precise question a solution must be sought upon principle and by resort to cases as nearly analogous as may be.

It is not to be doubted that the dismissal of the action in which the injunction was issued was a dissolution of the injunction and the discharge of the receiver and discharged the sureties on his bond from any subsequent liability. Their engagement relates to that action and none other and when it was dismissed all their obligations terminated except such as had already accrued. The fact that the plaintiff, Noble, might bring another similar action does not concern the sureties in the dismissed action nor can it affect their liability, for their bond has no relation to a subsequent action. We think it is equally true that, in the absence of fraud or collusion, the sureties are bound by the judgment against their principal in the proceeding to the extent of their engagements in the bond. Had the court, on a hearing on the merits, determined that the appointment of the receiver had been procured wrongfully or without sufficient cause, such judgment would have been conclusive against the sureties. Mr. Freeman says: "It seems to be generally conceded that whenever a surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts he is concluded by the judgment." (1 Freeman on Judgments, sec. 180 [3d ed].) The author cites many examples of cases, such as injunction bonds; sureties who have become parties to a bond for the delivery of property replevined; or to dissolve an attachment, or to release attached property; sureties upon the bond of an administrator or executor—instances, too, where the responsibility of sureties is fixed in suits to which they were not parties, and in which they were not tendered an opportunity to defend. The rule is given in *Braiden v. Mercer*, 44 Ohio St. 339, [7 N. E. 155], where many cases are examined. We can see no reason why the rule should not apply to sureties who have engaged to answer for damages which may result from their principal having procured the appointment of a receiver wrongfully or without sufficient cause.

The court cannot appoint the receiver until the undertaking is given and in it the sureties engage that if their principal procures the appointment wrongfully or without sufficient cause, they will pay all damages sustained by reason thereof. They distinctly "contract with reference to the conduct of one of the parties" to the suit.

The question was quite fully discussed by Mr. Justice Brewer, in *Hoge v. Norton*, 22 Kan. 374, which was the case of dissolution of an attachment. The court, however, did not consider what result would follow if the record had disclosed a dissolution by the voluntary dismissal on the part of the plaintiff. And this brings us to the question here, Was the judgment dismissing the action, upon the motion of plaintiff, determinative of the fact that the appointment of the receiver was procured wrongfully or without sufficient cause?

In *Dowling v. Polack*, 18 Cal. 626, the court said: "This is an action upon an injunction bond, and the dismissal of the suit in which the injunction was issued amounted to a determination by the court that the injunction had been improperly granted. The suit was dismissed for want of prosecution, and with respect to the particular case, the judgment of dismissal had the same effect upon the rights of the parties as would have resulted from a judgment upon the merits. It terminated the proceedings, and by its legal operation and effect set aside and discharged the injunction; it was the final action of the court operating directly upon the injunction, and destroying the foundation upon which it rested." Cases are cited in which the action was dismissed on motion of the plaintiff with the same result. Continuing, said the court: "Looking at the matter in the light of principle, it would seem that the failure of a plaintiff to prosecute his suit should be regarded as a concession of his inability to maintain it. The issues are not actually examined and passed upon, but by his failure to appear he virtually confesses that the result of a trial would be to find them against him. A dismissal under such circumstances must be understood as proceeding upon this idea, and so far as relates to the case itself, as determining everything involved in it. In effect, a dismissal is a final judgment in favor of the defendant; and although it may not preclude the plaintiff from bringing another new suit, there is no doubt that for all purposes connected with the proceeding in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits." Affirming this case, in *Lesse v. Sherwood*, 21 Cal. 152, 164, it is said: "A dismissal of the action is a final decision of the action,

and it is a final decision of the action as against all claims made by it."

In *Fowler v. Frisbie*, 37 Cal. 34, the injunction was dissolved on motion of the defendants but it did not appear upon what grounds. Said the court: "Standing alone, and without explanation, the order was an adjudication that the injunction ought not to have issued." (See, also, *Porter v. Hopkins*, 63 Cal. 53.)

In *Asevado v. Orr*, 100 Cal. 293, 299, [34 Pac. 777], *Dowling v. Polack* was affirmed. In that case there was a voluntary dismissal of the action. Orr was not a party to the bond and as to him he was held not liable on grounds in no wise affecting the liability of the sureties. As to them the court said: "The voluntary dismissal of the action by the plaintiffs had the same effect as a decision of the court that they were not entitled to the injunction."

In *Frahm v. Walton*, 130 Cal. 396, [62 Pac. 618], *Dowling v. Polack* was again affirmed. The court said: "As the voluntary dismissal of the action by the plaintiffs was an admission by them that they were unable to maintain their injunction, it must follow that, by the terms of the undertaking, the defendants are entitled to recover from the sureties whatever damages they have sustained by reason of the injunction."

In the case last cited a motion of defendants was pending for the discharge of the injunction, as there was here a motion to discharge the receiver supported by affidavits, but the plaintiffs did not wait for the hearing of the motion. The court said that plaintiffs could not deprive the defendants of their right to compensation by "rushing to the clerk's office and dismissing the action before the court could make an order upon the motion."

In *Lothrop v. Southworth*, 5 Mich. 436, it was held, in an injunction suit, that the surety was bound by a decree against his principal and could raise no question as to its correctness. It was said in this case that the surety undertook that his principal should abide the judgment of the court. "He can, therefore, raise no question of the correctness of the decree, nor impeach it in this collateral proceeding." Similarly, it was said, in *Towle v. Towle*, 46 N. H. 434: "By signing the bond in suit with Towle, the plaintiff in the suit in equity, the securities voluntarily assumed such a connection with that

suit that they are concluded by the decree in it in the present suit upon the bond so far as the same matters are in question."

The engagement of a surety on an injunction bond is "to the effect that he will pay to the party enjoined such damages . . . as such party may sustain . . . if the court finally decides that the applicant was not entitled thereto." (Code Civ. Proc., sec. 529.) In *Asevado v. Orr*, 100 Cal. 293, 299, [34 Pac. 777], the court said: "Their (the sureties) liability depends simply upon proof that the injunction was issued, that the defendants suffered damages thereby, and that the court has decided that the plaintiff was not entitled to the injunction. The voluntary dismissal of the action by plaintiff had the same effect as a decision of the court that they were not entitled to the injunction." In short, the judgment of dismissal on plaintiffs' motion was conclusive of the fact that the plaintiffs were not entitled to the injunction and the sureties could not retry that issue in an action against them on their bond. We are unable to see why the principle governing these cases does not and should not apply to the case before us.

In the Kansas case, Mr. Justice Brewer points out that the view urged by appellant "exposes to this possible result":

Unless the judgment of dismissal is conclusive on the sureties as well as upon the principal, as respects their liability for compensatory damages, a retrial of the issue in an action on the bond might result in a verdict, if tried by a jury, in favor of the sureties and become final upon appeal. Thus we would have two conflicting judgments upon the same issues of fact. While such a result may not always be avoided it should not be allowed to happen unless imperative rules of law would sanction it as necessary to avoid doing some greater injustice. We do not think it unreasonable to hold that the sureties contracted with knowledge that their principal had the right, and might exercise it, to dismiss his action, to be followed by such consequences as the law would impose. The pleadings in the original action show that it was brought to enjoin the defendants (plaintiffs here) from interfering with real and personal property involved. The appointment of a receiver was ancillary to that action and not its main object. It would seem to us that this furnishes some reason for apply-

ing the rule governing the liability of sureties on the injunction bond. There is no reason why the rule in actions on injunction bonds should prevail to allow the recovery of damages upon the dismissal of the action and deny it on the receiver's bond, given in the same action, unless the terms of the latter bond compel it, and we do not think they do. Besides, as intimated above, the appointment of the receiver necessarily depends upon the right to the injunction and when that right is swept away it carries with it all justification for appointing the receiver. If the injunction was improperly issued it must follow that the appointment of the receiver was without sufficient cause.

Appellant cites many cases illustrating the liability of sureties on official bonds. These cases are not in point. In those cases the sureties, as was said in *Pico v. Webster*, 14 Cal. 202, [73 Am. Dec. 647], cited by appellant, "undertake in general terms that the principal will perform his official duties." The sureties do not undertake that the principal will perform a specific act in a particular way. The acts of public officers performed in official capacities are not in the same class with the acts of a principal in a judicial proceeding for which sureties stand sponsor.

Cases cited by appellant for malicious prosecution and the like are not in point. No question of motive or probable cause is here involved. (*Asevado v. Orr*, 100 Cal. 293, [34 Pac. 777].)

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 10, 1914.

[Crim. No. 308. Second Appellate District.—November 13, 1913.]

THE PEOPLE, Appellant, v. BENJAMIN F. OSTRANDER,
Respondent.

BURGLARY—BREAKING AND ENTRY—INTENTION.—One who breaks and enters a boat-house to obtain a place for his companion to rest is not guilty of burglary.

ID.—NEW TRIAL—REVIEW OF ORDER GRANTING.—Where a conviction for burglary is had on conflicting evidence, an order of the trial court granting a new trial will not be disturbed on appeal.

APPEAL from an order of the Superior Court of San Diego County granting a motion for a new trial. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, George Beebe, Deputy Attorney-General, H. S. Utley, and W. Wirt Francis, for Appellant.

Robbins & Bauer, for Respondent.

JAMES, J.—Defendant was charged by an information filed by the district attorney of the county of San Diego with having, on or about the twenty-fourth day of April, 1913, in said county, committed the crime of burglary. More particularly stated, the information charged that defendant at the time and place mentioned entered a certain building known as the Z. L. A. C. Rowing Club with intent therein to commit the crime of larceny. A trial was had before a jury and a verdict of guilty of burglary of the first degree was returned. Defendant thereafter moved that a new trial be granted him upon several grounds, one of which was that the verdict was contrary to the evidence. By a general order the trial judge granted this motion and the people have appealed.

The evidence showed that the defendant was apprehended by an officer immediately after he had removed a pane of glass from a door of the building of the rowing club and effected an entrance into one of the rooms. It was shown that some person had on several prior occasions broken into the building and into certain lockers used by members of the club,

from which various articles were stolen. The defendant on his own behalf offered himself as a witness and admitted having broken the glass and entered the building. He testified that he had accompanied a young woman for a promenade and that while on this expedition he and the woman had gone down to the rowing club house; that the girl said she was tired and wanted to sit down, and that he tried the door, intending to enter the building only for the purpose of allowing the girl to rest, and upon finding the door locked broke the pane of glass and so effected an entrance. To make out the offense charged in the information it was essential that the defendant had the intent to commit the crime of larceny at the time he entered the building. This intent he denied having had and offered as a reason for his act the explanation just referred to. The trial judge was called upon to review the testimony in determining whether the verdict was sustained by the evidence, and he evidently gave credit to the statement made by the defendant. It may be remarked that as the testimony appears in the cold record, the explanation made by defendant is hardly worthy of credence, particularly as no young woman was seen or heard to be about the club house at the time of defendant's arrest; still, having seen and heard the witnesses, the trial judge was authorized and required to draw his conclusions as to the sufficiency of the evidence to sustain the conviction, and in such a case this court cannot interfere with his determination of that matter. There was a conflict of evidence, and therefore on this appeal a question of law is not presented.

The order is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1412. Second Appellate District.—November 14, 1913.]

KATE MEDLIN, Respondent, v. M. SPAZIER, Appellant.

NEGLIGENCE — WHAT CONSTITUTES — CIRCUMSTANCES OF CASE.—Negligence is a comparative term, and hence the degree of care which in one case would constitute negligence might in another be deemed the exercise of more than prudence. Of necessity the question presented is nearly always one of fact for the jury to determine from the circumstances surrounding the case.

ID.—AUTOMOBILE COLLIDING WITH PERSON ALIGHTING FROM STREET-CAR.

Where a city ordinance provides that drivers shall not operate their vehicles within four feet of the lowest step of a street-car which is taking on or letting off passengers, a passenger alighting from a car has the right to assume that the ordinance will be observed. She is not required, while in the protected zone, to look up and down the street for approaching vehicles, and if she is struck by an automobile, her failure to so look cannot be urged as contributory negligence in her action for resulting injuries.

ID.—WITNESS FALSE IN PART—REFUSAL OF INSTRUCTIONS RESPECTING.—

The refusal of the court in such action to instruct the jury at the request of the defendant that a "witness false in one part of his testimony is to be distrusted in others," while erroneous, when witnesses for the plaintiff have testified that the defendant's automobile was running at the time of the accident but witnesses for the defendant have testified that the automobile was standing still, is not reversible error, where it is apparent from the verdict that the jury did not believe the testimony of the defendant's witnesses.

ID.—WITNESS FALSE IN PART—IMPORTANCE OF INSTRUCTION CONCERNING.—

An instruction that a "witness false in one part of his testimony is to be distrusted in others," belongs to that class of instructions which pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. Hence if not prejudicial to the case of the complaining party, neither the giving nor the refusing of such instruction will be held ground for reversal.

ID.—REFUSAL TO GIVE INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.—

The refusal of the court to give several instructions touching the question of contributory negligence, as requested by the defendant, is not error, if they are covered by other instructions given.

ID.—POSSESSION OF FACULTIES BY PLAINTIFF—REFUSAL OF INSTRUCTION REGARDING.—

Instructions to the effect that the defendant had a right to assume that the plaintiff was in full possession of her faculties of sight and hearing, unless he had notice to the contrary, was properly refused, if there was no claim that the plaintiff was not in full possession of such faculties, or that by reason of the want thereof any greater duty devolved upon the defendant.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

Davis, Lantz & Wood, for Appellant.

H. G. Redwine, for Respondent.

SHAW, J.—This is an action to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in operating an automobile which struck plaintiff as she alighted from a street-car. Defendant answered, denying the alleged negligence on his part, and as a separate defense alleged that plaintiff was guilty of contributory negligence.

The case was tried by a jury the verdict of which was in favor of plaintiff, in accordance with which judgment was entered in her favor. Defendant prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

About 2 o'clock in the afternoon, plaintiff was a passenger on a street-car traveling north on Spring Street in Los Angeles. At the intersection of Sixth Street, where the car stopped, she with others alighted from the rear exit of the car on the east side of the street, intending to cross the driveway to the sidewalk, at which time she collided with an auto operated by defendant traveling north on said east side of the street, was knocked down and sustained the injuries upon which the claim for damages is based.

There was evidence tending to prove that defendant in operating the auto gave no warning of his approach, and violated the city ordinance in that, while attempting to pass the street-car, which had stopped for the purpose of taking on and letting off passengers, he neglected to keep his vehicle at least four feet from the lowest step of the car.

Notwithstanding such showing of negligence on the part of defendant, appellant claims that the evidence as a matter of law shows that the injury to plaintiff was due to her own negligence, for the reason that she did not look down the street in the direction of the approaching auto when she got off the car. This contention is without merit. Negligence is a comparative term, and hence the degree of care which in one case would constitute negligence might in another be deemed the exercise of more than prudence. Of necessity the question presented is nearly always one of fact for the jury to determine from the circumstances surrounding the case. (*King v. Green*, 7 Cal. App. 473, [94 Pac. 777].) Moreover, the evidence clearly tends to prove that the car had stopped at the usual place and passengers were getting on and off the same;

that plaintiff was within four feet of the lower steps of the car, within which zone defendant was by ordinance prohibited from running his auto; that the auto was being run within about two feet of such steps. "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law, and in the absence of reasonable ground to think otherwise it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person." (29 Cyc. 516.) Plaintiff had the right to assume that while within such zone she occupied a position of safety, and in the absence of any warning or reason to believe that defendant would violate the city ordinance, she was not negligent in failing to look up and down the street when she alighted from the car to see if the drivers of approaching vehicles were operating same on that part of the street upon which they were prohibited from traveling. Contributory negligence cannot be predicated upon the assumption that one will violate the law; hence plaintiff was not negligent in failing to look in order to see if defendant was running his auto within what was prescribed as the zone of safety for passengers alighting from the car. Being lawfully there, she had the right to assume that for the time being she would be as safe from collision with automobiles as she would be upon the sidewalk.

The refusal of the court to instruct the jury that a "witness false in one part of his testimony is to be distrusted in others" is assigned as error. The testimony of plaintiff and three of her witnesses, to the effect that defendant's auto was running at the time when the collision occurred, is flatly contradicted by defendant and three of his witnesses, who testified that at the time the auto was standing still and that plaintiff was not struck by it but fell in front of the auto. Section 2061 of the Code of Civil Procedure, provides that "on all proper occasions" the jury "are to be instructed by the court" . . . "that a witness false in one part of his testimony is to be distrusted in others." We entertain no doubt that the case at bar, by reason of a direct conflict of testimony adduced upon a material fact, was a proper occasion for the giving of the instruction requested, and the court erred in its refusal to give it. (*Thomas v. Gates*, 126 Cal. 4,

[58 Pac. 315].) Such instruction, however, belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. (*People v. Delucchi*, 17 Cal. App. 96, [118 Pac. 935].) Hence, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground of reversal. (*People v. Corey*, 8 Cal. App. 728, [97 Pac. 907], and cases there cited.) It is apparent from the verdict returned that the jury did not believe the testimony of defendant's witnesses, to the effect that when plaintiff alighted from the car the auto was not running, but standing several feet away by the street curb. Clearly the jury was satisfied that the testimony of defendant and his witnesses was willfully or otherwise false. This being true, it is impossible to perceive how defendant's substantial rights could have been prejudiced by the refusal to give the instruction. In our opinion, had it been given, the verdict must necessarily have been the same. Under section 475 of the Code of Civil Procedure, error is not presumed to be prejudicial, and it is made the duty of the court to disregard any error or instruction which in the opinion of the court does not affect the substantial rights of the parties.

The refusal of the court to give several instructions touching the question of contributory negligence, as requested by defendant, is assigned as error. In so far as these instructions stated the law applicable to the case, the matters contained therein were fully covered by instructions given upon the law of contributory negligence. Instruction "M," to the effect that defendant had a right to assume that plaintiff was in full possession of her faculties of sight and hearing, unless he had notice to the contrary, was properly refused because there was no claim that plaintiff was not in full possession of such faculties, or that by reason of the want thereof any greater duty devolved upon defendant. Instruction "C," to the effect that it was the duty of plaintiff when she alighted from the car to exercise her faculties of sight and hearing in order to apprise herself of danger, and that to look in a careless manner was as negligent as not to look at all, and that if she could by looking have known of the approach of the automobile it was negligent not to look was properly refused because it failed to state the law applicable to the case. As we

have seen, it was shown by the evidence that the collision occurred while the plaintiff was within the protected zone, within which defendant was prohibited by ordinance from running his auto, and hence imprudence and want of care cannot be predicated upon the fact that plaintiff did not assume a violation of law on the part of defendant.

The record discloses no prejudicial error, and the judgment and order appealed from are, therefore, affirmed.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 4, 1913, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 13, 1914.

[Civ. No. 1354. Second Appellate District.—November 14, 1913.]

JAMES F. YOUNG, Appellant, v. KITTIE E. YOUNG,
Respondent.

DIVORCE—CONFLICT IN EVIDENCE—DENIAL OF DECREE—APPEAL.—Where the evidence is conflicting in an action by a husband for a divorce on the ground of desertion by reason of his wife's persistent refusal to have reasonable matrimonial intercourse with him, a judgment denying a divorce will be affirmed on appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County denying a decree of divorce. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Trask, Norton & Brown, for Appellant.

JAMES, J.—Plaintiff has appealed from a judgment denying him a decree of divorce. Defendant did not make an

swer to the complaint, and after hearing the evidence offered by the plaintiff, and other evidence which was introduced upon the court's own motion, judgment was entered denying the relief prayed for.

The parties to the action were married in the year 1882 and there were born to them three children, the youngest of whom at the time this action came on for trial was 22 years of age. The wife was of the age of about 45 and was, so far as the evidence showed, with the exception of an item thereof which will be noticed later, a strong, vigorous, healthy woman. As cause for divorce plaintiff assigned the ground of extreme cruelty and further charged that defendant had for more than a year prior to the commencement of the action been guilty of desertion by reason of her persistent refusal to have reasonable matrimonial intercourse with him. Without dispute, at all, the evidence showed that for at least seven years the defendant had refused to live with the plaintiff as his wife, although during the whole of that time he had contributed to her support and had in fact wholly supported her out of his earnings as a railway conductor, which amounted to about the sum of eighty-four dollars per month. While the plaintiff was being first examined as a witness, the trial judge inquired of him as to whether his wife was present in court, and he replied that she was not. Later when the judge stated that he desired to have the defendant present so that he might interrogate her and would continue the hearing for the purpose of securing her presence, the plaintiff then stated that she was in court. This conduct of the plaintiff in first denying that his wife was present and afterward admitting that she was in the court-room seems to have had great weight in determining the cause against him, although, as the record is here presented, there appears to have been abundant excuse for his first assertion that his wife was not in the court-room. She came wearing spectacles which she was not in the habit of wearing, and wore a veil over her face. Plaintiff in explanation of his divergent statements told the court that he had not at first recognized his wife in that disguise, and her own daughter, who appeared to be more favorably disposed toward her mother than toward the plaintiff, testified to the effect that she did not recognize her mother when she first looked about the court-room. The wife when called as a wit-

ness admitted that she had only had the spectacles about a week and had never during the whole period of her life prior thereto had any need to use articles of that kind. The evidence showed a most pronounced state of inharmony existing between plaintiff and defendant. This condition was attributable to the persistent refusal of the defendant to live with the plaintiff as his wife. The general conduct of the defendant toward the plaintiff tended to show that she had no affection for him, and that she merely continued to occupy the home which he provided in order that she might be thus supported at his expense. In order to justify her attitude toward her husband, after having the admission drawn from her on the witness-stand that she had practically lived separate from him for seven years, she testified that her physical condition was not such as to permit her to do otherwise. She further said: "I am never free from a woman's complaint." This testimony furnished the one single item of proof, and the only item of proof, upon which the trial judge could base a denial of the plaintiff's prayer for relief. As contradicting this bare assertion of the defendant as to her physical condition was the admission made by her that she had only needed the services of a physician once or twice during a period of many years; the statement of a neighbor who testified that the defendant had admitted to her that she was not acting toward plaintiff as his wife, stating as her reason therefor that she "hated him" (defendant first said that she did not remember whether she made this statement, but when pressed for a more positive answer replied that she had not so stated); there was the wife's further testimony that she weighed about one hundred and sixty-three pounds, and the testimony of the husband that she had never had any severe sickness of any kind and had never placed her refusal to live with him as his wife upon the ground of her physical inability so to do. Further, when defendant was asked whether she was willing to submit herself to the examination of a physician to be selected by the court, she demurred and the court then interrupted and said that he would not order such examination in that kind of a case. It was upon this state of the evidence that the trial judge in summing up said: "They are conflicting about their testimony. So far as the testimony is concerned, I don't put very much credence in it, from the

fact that plaintiff sat here on the witness-stand and said he did not know his wife, although she had a thin veil on and glasses." So far as the matter of credibility of the plaintiff was concerned, his credibility was not called in question as to any of the main facts of the case, for upon such there was no dispute of any kind whatsoever. There was then only the statement of the wife, as before indicated, given in excuse for her conduct, that her physical condition was not such as to make a closer relation with her husband advisable. This is the one solitary issuable fact upon which, considering the charge of desertion, there can be said to have been a conflict. The rule, however, which precludes an appellate court from interfering with the conclusions of a trial judge where there is any conflict of evidence must compel here an order affirming the judgment. While the evidence which created the conflict upon the point discussed, as presented by the record, appears meager, and while it does seem that the trial judge allowed the fact that plaintiff did not at once recognize his wife in the court-room, to influence his decision on the main issue, still it must nevertheless be said that there was some evidence which sustains the judgment. The charge of extreme cruelty has not been noticed in this discussion, and as to that charge it is sufficient to say that the evidence offered in support of this count in the complaint was of such a nature as to entirely warrant the trial judge in determining that cause of action adversely to plaintiff.

For the reasons stated, the judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 13, 1914.

[Civ. No. 1161. Third Appellate District.—November 15, 1913.]

KARL EMIRZIAN, Respondent, v. SOSEI ASATO, Appellant.

SPECIFIC PERFORMANCE—CONTRACT TO GROW AND SELL ORANGE TREES.—

Where one breaks his contract to grow and sell nursery orange trees of a kind which can be bought in the market at the place where the agreement is made, the buyer cannot maintain an action for specific performance against the seller and have him enjoined from disposing of the trees to others; the remedy is an action at law for damages.

ID.—BREACH OF AGREEMENT TO SELL CHATTELS—REMEDIES.—There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation; and where the breach of such a contract can be thus compensated, an injunction will not be granted to prevent the breach.

ID.—PERSONAL SERVICE—SPECIFIC PERFORMANCE OF CONTRACT RESPECTING.—Performance of an obligation to render personal service cannot be specifically enforced.

ID.—CONTRACT RELATING TO CHATTELS—SPECIFIC PERFORMANCE.—In general a court of equitable jurisdiction will not decree the specific performance of a contract relating to the transfer of personal property which has a market value and no special or unique value, and which is bought and sold in the open market. The remedy at law is sufficient, since, with the unpaid purchase money and the moneys recovered by action, the buyer can purchase in the open market property of the same character as that contracted for, if the seller is in fault.

ID.—OFFER OF PERFORMANCE BY DEFENDANT—REFUSAL OF ACCEPTANCE—FINDING.—Where in an action for the specific performance of a contract to grow and sell nursery orange trees the seller alleges offer of performance and refusal of acceptance, he is entitled to a finding upon such issue.

ID.—FINDING ON MATERIAL ISSUE—FAILURE TO MAKE.—A failure to find on a material issue demands a reversal of the case, and a judgment based upon findings which do not determine all the material issues is a decision against law.

APPEAL from a judgment of the Superior Court of Fresno County. Geo. E. Church, Judge.

The facts are stated in the opinion of the court.

Geo. Cosgrave, for Appellant.

W. D. Crichton, and C. K. Bonestell, for Respondent.

CHIPMAN, P. J.—This is an action to enforce the specific performance of a written contract to deliver certain (nursery) orange trees; to enjoin defendant, during the pendency of the action, from disposing of said trees otherwise than as provided in said contract; for damages resulting from defendant's failure to properly care for said trees; and for such further relief as may be proper in the premises.

A jury, called to try the issues of fact, returned a general verdict for the defendant. On motion of plaintiff the court set aside the verdict and gave its decision in favor of plaintiff.

The contract of which specific performance was sought was entered into June 8, 1909, by which first party (plaintiff) agreed to buy and second party (defendant) agreed to sell "4,000 Washington orange trees, more or less, for the sum of twenty-five cents per tree as follows, to wit: Party of the second part will immediately at his place of business in the town of Centerville, Fresno County, California, proceed to put, cultivate and care for said orange trees for a period of one year from date, whereon, and of which time, party of the first part will select from the body of the orange trees, so grown by the party of the second part 4,000 orange trees, all of which must be good, strong, healthy trees and over two feet high, after which time party of the first part shall pay the party of the second part, reasonable value for any services, necessary to care for said trees for one year more, whereby on and in the month of June, 1911, said party of the second part agrees carefully and in a workmanlike manner ball all of the said trees and place the same in proper condition to be delivered to party of the first part. Party of the first part to arrange the sacks sufficient for said balling and party of the first part agrees to pay party of second part sum of twenty-five dollars cash on execution and delivery of this agreement, the sum of one hundred dollars, on or before ninety days from date, the remainder of the purchase price to be paid when the said trees are accepted and delivered to the party of the first part."

In plaintiff's second amended and supplemental complaint it is further shown: That defendant planted four thousand orange trees pursuant to said contract and proceeded to care for the same; that, in June, 1910, plaintiff was ready and willing "to select from the body of the orange trees so grown by"

defendant; but that none of said trees were over one foot high and "defendant requested plaintiff to wait another year to make such selection," defendant to continue the care of the same, "to all of which plaintiff agreed"; that, in June, 1911, plaintiff selected two thousand six hundred from among said four thousand trees and agreed to take the same provided defendant would cultivate and care for the same until the month of March, 1912, and it was then agreed orally that the trees should remain in the ground, defendant to continue to care for them until March, 1912, and that plaintiff and defendant should enter into a written contract modifying the terms of the original agreement extending the time one year, and thereafter defendant refused to sign said agreement and refused to cultivate or care for said trees or to deliver them or any of them and threatened to sell to other parties; that plaintiff has at all times been ready and willing to pay the reasonable value of defendant's services in and about the planting and cultivating said trees and has fully performed all the conditions of said agreement by him agreed to be performed; that defendant has failed to care for said trees, by reason whereof and by reason of damage from frost many have died; that the price agreed to be paid was just and adequate and that in the event plaintiff should "be unable to obtain said trees, he will be damaged in the sum of \$4,000, by reason of the fact that he will be hereafter unable to purchase trees of the same character as those agreed to be furnished to him by defendant, at less than \$1.00 each in the open market"; that defendant is insolvent and unable to respond in damages to a greater sum than five hundred dollars. Wherefore plaintiff prays the decree of the court directing defendant to deliver said trees to plaintiff as provided in said contract; that defendant be enjoined from disposing of any portion of said trees otherwise than as provided in said contract; "that defendant be compelled to pay such damages as may result from his failure to properly care for and cultivate said trees" and for such other relief as may be proper in the premises.

Defendant denied the material averments of the complaint except as to the making of the contract of 1908; denied that the price was adequate or just or reasonable; denied his insolvency and alleged that he was responsible for any judgment plaintiff might recover. Alleged, as a further defense,

that plaintiff refused to pay him for work done after June, 1910; that plaintiff failed to furnish sacks for balling said trees and that, in June, 1911, and again on December 13, 1911, defendant duly offered all of the trees, as required by the terms of his contract, and plaintiff then and there refused to accept them or to pay defendant the reasonable value of his services. By way of cross-complaint defendant alleged that plaintiff refused, in June, 1911, and again on December 13, 1911, to accept the orange trees mentioned and by reason thereof defendant was damaged in the sum of five hundred dollars.

The court found the facts much the same as alleged in the amended complaint. With regard to the oral agreement of 1910 and the agreement of June, 1911, to enter into a written agreement, the court found that defendant refused to sign said latter agreement or to receive any money and refused to deliver any of the trees at any time to plaintiff "and has ever since refused to perform the terms of either of said agreements to be by him performed."

In its decree the court adjudged as follows: "1st. That plaintiff is entitled to have and receive from defendant the 2600 orange trees selected by plaintiff in June, 1911, from the body of the orange trees being grown by defendant in or near the town of Centerville, county of Fresno, state of California, as specified in the written contract set forth in the complaint.

"2nd. That plaintiff furnish sacks sufficient to ball said trees.

"3rd. That defendant thereupon ball the same in careful and workmanlike manner and place the same in proper condition to be delivered to plaintiff and deliver the same to him.

"4th. That thereupon plaintiff pay to defendant the sum of 25 cents for each tree delivered and the further sum of \$40 for expenses incurred in the care of said trees from June, 1911, and the sum of \$10 being the rental value of the land upon which the same were being grown, from June, 1911.

"5th. In the event that the defendant shall be unable to deliver 2600 trees by reason of any injury which has been suffered since June, 1911, the defendant shall deliver other trees of a quality and size equal to those selected by plaintiff in June, 1911, instead thereof; or, shall pay to plaintiff for such

shortage at the rate for which similar trees can be bought at or near the same place.

"6th. In the event that the parties hereto cannot agree as to the number of trees injured or the amount of injury done, if any, or the size or quality of trees offered in lieu of injured trees, or the price of such trees as defendant shall fail to deliver, an application may be made to this court for the appointment of a referee to hear and determine such matters and this case is left open for such purpose.

"7th. The defendant is enjoined from disposing of, or dealing with said trees in any manner other than herein provided."

Appellant makes the following points: 1. That the case is not one where specific performance can be adjudged; 2. The evidence does not support the findings and the findings do not support the judgment; 3. The court had no jurisdiction to set aside the verdict, because it was stipulated by the parties that a general verdict should be had in the case; 4. There was no adequate consideration for the contract; 5. There was a failure to find on material issues. We do not think it necessary to consider all these points.

It seems to us that, in view of the undisputed facts and on the face of the pleadings, findings, and decree, it is apparent that plaintiff may be fully compensated in damages and that his remedy is at law only. There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation. (Civ. Code, sec. 3387.) And where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach. (Code Civ. Proc., sec. 526, subds. 4, 5.) Performance of an obligation to render personal service cannot be specifically enforced. (Civ. Code, sec. 3390.) Commenting upon sections 3387 and 3389 of the Civil Code, Mr. Justice Henshaw said, in *Glock v. Howard & Wilcox Colony Co.*, 123 Cal. 1, 6, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 713]: "It is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then—that is to say, for those where the law is sufficient, and for those where equity is powerless to aid—the injured party must seek legal redress."

"In general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels because there is not any specific quality in the individual articles which gives them special value to the contracting party and their money value recovered as damages will enable him to purchase others in the market of the like kind and quality." (Pomeroy on Contracts, Specific Performance, sec. 11.)

If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient since with the unpaid purchase money and the moneys recovered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault; likewise, where the vendee is in fault, the vendor may sell in the open market and the purchase price obtained, together with his damages, will furnish full compensation. In such cases specific performance is denied. (3 Page on Contracts, sec. 1629.) Mr. Page gives, as a common illustration of the denial of specific performance, cases where, though the remaining facts are sufficient to justify such equitable relief, the contracts involve continuous duties of a personal nature (*Id.*, sec. 1633); a principle embodied in section 3390 of our Civil Code.

We do not think the present case furnishes an exception to these general principles, and, governed by them, we do not see how we can sustain the judgment.

The undisputed facts here are that orange trees (in nursery) were bought and sold in the open market, where this contract was made, and had a market value. Defendant himself had several thousand trees, besides the group of four thousand mentioned, in an adjoining nursery from which plaintiff could have selected such trees as his contract called for but declined to do so. The contract does not refer to any particular group of trees. Other persons in the neighborhood were growing orange trees for market and testified to their market value. It is beyond dispute that plaintiff could have gone into the open market at Centerville and purchased all the trees he required. The complaint so alleges and states the market price. His allegation of defendant's insolvency was not supported by any evidence nor was this issue found upon by the court. Defendant alleged his ability to meet any pecuniary demand of plaintiff and nothing appeared to

call it in question. It was shown that, in June, 1911, defendant refused to enter into the contract to hold and care for the trees until the following March, and in effect then and there repudiated his original contract, except to allow plaintiff to take the two thousand six hundred which he said he was willing to select. Plaintiff insisted that defendant should hold and care for these trees until the following March and that a written agreement should be signed to that effect. Defendant refused to sign the agreement and hence it was not obligatory upon him. (*Fuller v. Reed*, 38 Cal. 99; *Spinney v. Dowling*, 108 Cal. 666, [41 Pac. 797].) Plaintiff's cause of action accrued then and there. But there arose no right of action to enjoin defendant from disposing of trees; nor to compel him to perform personal service by holding and caring for them and to "ball" them when delivered. Plaintiff's right was simply to go into the open market and buy the trees required by him and bring his action against defendant for damages. If there had been no Washington (navel) orange trees available and plaintiff could not therefore supply his needs of this particular kind of tree and it had appeared that defendant could supply them, there might have been some ground for holding defendant to the specific performance of his agreement. But no such state of facts was alleged nor proven. We cannot see that this case is any different from that where a farmer agrees to sell, but afterward refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person; compel him to irrigate or otherwise care for it and bale and deliver it to the vendee at some future time. Nor do we think that in such an action as the present one could the vendee "have a referee appointed to hear and determine" questions of disagreement as to the injury done to the trees, the number of trees injured, their size and quality, and the price should defendant fail to deliver them, as the decree provides, for all which purposes the case was left open.

Respondent cites 36 Cyc. 555, as follows: "A court of equity therefore will not unless there is some special reason specifically enforce a contract for the sale of ordinary articles of

commerce''; and claims that, by the agreement of June, 1911, plaintiff acquired a special proprietary interest in the trees, and the agreement "established a sort of trust relationship between plaintiff and defendant." We have seen that the so-called agreement of June, 1911, was to have been reduced to writing which was not done, defendant refusing to execute it. But had defendant agreed to these new terms we cannot see that it would have changed the relationship of the parties from that of ordinary vendor and vendee or have given plaintiff any proprietary interest in the trees or made defendant his trustee in respect to them.

Attention has been called to the failure to find upon the issue of insolvency. In the cases cited by respondent insolvency was a material factor. Insolvency of itself is not a ground of equitable interference but, as said by Mr. Justice Thompson, in *Heilman v. Union Canal Co.*, 37 Pa. 100, referred to in *Livesly v. Johnston*, 45 Or. 30, [76 Pac. 946], cited by respondent: "In balancing cases, it is a consideration that gives preponderance to the remedy." In the present case it was alleged and, we think, was a controlling factor and should have been proven and found by the court.

While the defendant depended upon his defenses raised by his specific denials, he also had the right to rely upon his offer to perform his part of the contract and plaintiff's refusal to accept performance.

There was evidence that the parties met at the nursery by agreement, in December, 1911, for the purpose of settling their differences. There was evidence that defendant offered to let plaintiff select the trees from the four thousand patch and if he could not find enough there of the quality called for in the contract he could take from the other groups of six or seven thousand as to which there was evidence that a majority of them were good, strong, healthy trees not injured at all by frost.

When the case went to the jury the court instructed them as follows: "But if you find from the evidence that the defendant did in July, 1911, or in December, 1911, offer in good faith to the plaintiff to perform all the terms of the contract to be performed and that plaintiff refused to accept performance, in that case, you will find for the defendant." If the issue was a proper one to go to the jury, and we think it was,

it was also an issue on which the court should have made a finding. The real points at issue were whether there were enough trees of the kind and quality called for by the contract and whether defendant was willing and offered to furnish them.

It need hardly be added that a failure to find on a material issue demands a reversal of the case, and a judgment based upon findings which do not determine all the material issues is a decision against law. (*Knight v. Roche*, 56 Cal. 15; *Brown v. Burbank*, 59 Cal. 535; *Keiser v. Dalto*, 140 Cal. 167, [73 Pac. 828].)

The judgment is reversed.

Hart, J., and Burnett, J., concurred.

[Crim. No. 448. First Appellate District.—November 17, 1913.]

THE PEOPLE, Respondent, v. J. E. KING, Appellant.

CRIMINAL LAW—PROSECUTION FOR EMBEZZLEMENT—EVIDENCE OF PRIOR OFFENSES.—Where the defendant in a prosecution for embezzlement admits having received the money, but contends that he has returned it to the complaining witness, it is prejudicial error to admit evidence of previous offenses committed by the defendant, similar to the one charged, to show his guilty intent in dealings with the complaining witness.

ID.—EVIDENCE OF OTHER OFFENSES—WHETHER ADMISSIBLE IN CRIMINAL PROSECUTION.—Proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence. But this general rule is subject to certain well-defined exceptions, one of which is that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing a guilty intent whenever in any given case the existence of such intent is material and either disputed or doubtful.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Snook & Church, and J. J. Rose, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

LENNON, P. J.—The defendant in this case, having been convicted in the court below of the crime of felony embezzlement, prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

Minus minor matters, the facts of the case upon which the prosecution relied for a conviction are substantially these:

The defendant at the time of the commission of the crime charged in the information was engaged in the real estate business in the city of Oakland, and had been employed by the complaining witness, Antonio Marciel, to negotiate the purchase of a piece of real property situate in the county of Sonoma. During the pendency of such negotiations and as an incident thereof, Marciel was desirous of applying the sum of seven hundred dollars which he had in his possession to the satisfaction of a mortgage existing upon certain real property owned by him and situate in the county of Alameda. The defendant advised against this and persuaded Marciel to deposit said sum of seven hundred dollars in a safe deposit box rented and controlled by the defendant. When negotiations for the sale of the property were abandoned, demand was made upon the defendant, so the complaining witness said, for the return of the seven hundred dollars so deposited. It was developed as a part of the people's case, that when demand was made upon the defendant, he not only claimed that he had returned the money in question, but produced a receipt therefor purporting to have been signed by Marciel. Marciel admitted that the signature to the receipt was in his handwriting, but insisted, nevertheless, that he had not received from the defendant, or any one else, the money mentioned therein.

The defense of the defendant as against the specific crime charged in the information rested entirely upon the recitals of the receipt referred to, and his testimony that he had returned the money in question upon the demand of Marciel.

But one point is presented for a reversal, and that involves the rulings of the trial court permitting the prosecution, over

the objection of the defendant, to introduce evidence of other wholly independent and disconnected criminal offenses alleged to have been committed by the defendant. In this behalf the record shows that Antonio King Davila, a witness for the people, was permitted to testify that, as his agent, the defendant, in the latter part of the year 1911, had misappropriated and embezzled a certain sum of money.

Again, the prosecution was permitted, over the objection of the defendant, to show that in 1908, some several years prior to the time of the commission of the offense charged in the present case, the defendant had rented a horse and wagon which he failed to return to the owner, and that as a consequence the defendant was arrested and subsequently pleaded guilty to a charge of misdemeanor embezzlement.

Finally, Joe Faria, a witness for the people, was permitted, in the face of objection, to testify in effect that about a year previous to the trial of the case at bar, the defendant had embezzled the sum of three dollars which had been intrusted to him by the witness for the purpose of making the first payment on the purchase price of a horse.

All of the testimony just referred to was admitted by the trial court upon the theory that it tended to prove prior offenses similar in character to the crime charged in the information and for which the defendant was being tried, and was therefore admissible for the purpose of showing the guilty intent of the defendant in his dealings with the complaining witness in the present case. We are satisfied that the trial court erred to the prejudice of the defendant in admitting the testimony complained of. It is a well-settled rule of evidence that proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence. Unquestionably this general rule is subject to certain well-defined exceptions, one of which is that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing a guilty intent whenever in any given case the existence of such intent is material and either disputed or doubtful. For instance, in a case where a defendant admits the doing of the act charged in the information but defends upon the

ground that such act was free from felonious intent, proof of the commission of precisely similar acts, even though they be independent and disconnected, and were committed either before or after the commission of the crime charged, is relevant and competent for the purpose of showing a guilty intent. Such evidence is admissible as an exception to the general rule upon the theory that if it be shown that a defendant has been repeatedly guilty of similar offenses, it may be reasonably and logically inferred that the act charged against him in the information was accomplished with a felonious intent. (Underhill on Criminal Evidence, 2d ed., secs. 87, 89; *People v. Arnold*, 17 Cal. App. 68, [118 Pac. 729]; *State v. O'Donnell*, 36 Or. 223, [61 Pac. 892]; *People v. Molineux*, 168 N. Y. 264, [62 L. R. A. 193, 61 N. E. 286]; Jones on Evidence, secs. 142-145.)

Upon the oral argument in this court, the representative of the attorney-general contended that the evidence complained of was admissible under the exception to the general rule because, as he claimed, "it was always a question in this case prior to the time that the prosecution rested whether the defendant inadvertently retained this money or appropriated it knowingly." The facts of the case as revealed by the record before us do not sustain this contention, but show conclusively, we think, that at no stage of the case and under no view of the evidence could the exception to the rule stated be rightfully invoked and applied.

The evidence presented upon the prosecution's case in chief shows most clearly and unequivocally not only that the defendant at no time denied receiving the money in question, but, to the contrary, such evidence establishes that at all times, both before and after his arrest, he freely admitted having received the money, and persistently and consistently maintained that he had returned it to the complaining witness. Moreover, the case was defended entirely upon the theory that the defendant had received and returned the funds intrusted to him. Neither the facts of the main case as presented by the prosecution nor the defense relied upon contain the slightest suggestion that the defendant at any time sought to evade criminal responsibility for the alleged commission of the act charged against him upon the ground that he had innocently, through inadvertence, mistake, or

otherwise, withheld the money of the complaining witness. This being so, it seems clear to us that the evidence complained of was erroneously admitted.

After carefully considering the evidence adduced upon the main case we are far from being satisfied that a verdict of guilty would have been had without the aid of the evidence erroneously admitted. We do not wish to be understood as intimating that the evidence upon the main case would not alone have supported a conviction. That evidence was in violent conflict as to whether or not the money in question had been returned and receipted for as claimed by the defendant. This was the only disputed fact in the case; and of course in the presence of a conflict of evidence a verdict of guilty, if it had been obtained without the influence of erroneous evidence relating to collateral and prejudicial matters, could not have been successfully assailed upon the ground of the insufficiency of the evidence. What we mean to say is that upon a consideration of the cold record of the conflicting evidence adduced upon the main case, and without the opportunity of seeing and hearing the witnesses who testified on the trial, we are not convinced that the defendant would have been convicted without the aid of the evidence complained of. We are satisfied that such evidence not only tended to divert the deliberations of the jury from the main issue of the defendant's guilt or innocence of the crime for which he was being tried, but must have operated to create in the minds of the jury a prejudice against the defendant so pronounced as to preclude an unbiased consideration of the question as to whether or not, in its entirety, the evidence upon the main case left a reasonable doubt of the defendant's guilt. In short, it affirmatively appears to us that the defendant was substantially injured by the error complained of, and, therefore, we are in duty bound to order a new trial. (*People v. Lawlor*, 21 Cal. App. 63, [131 Pac. 63].)

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on January 15, 1914.

[Civ. No. 1325. Second Appellate District.—November 17, 1913.]

C. L. DENNEN, Appellant, v. H. A. JASTRO, Respondent.

ELECTION—PRINTING OF BALLOTS—CANDIDATE OF MORE THAN ONE PARTY.—It was the intention of the legislature, as expressed in section 1197 of the Political Code, that where a candidate is the nominee of two or more political parties, his name should appear upon the ballot but once, followed by appropriate words designating him as the candidate of such parties; but this provision, like many other minute directions contained in such section, is not essential to the validity of the election but is directory only.

ID.—BALLOTS—PRINTING NAME OF CANDIDATE TWICE.—To print the name of a candidate of two political parties for the office of supervisor twice upon the ballot, followed by the separate designation of each political party, instead of but once followed by the designation of both parties, while an irregularity, does not invalidate the election.

ID.—ELECTION LAWS—FAILURE TO COMPLY WITH TECHNICAL DIRECTIONS—WHETHER INVALIDATES ELECTION.—A failure to comply with some technical direction of an election statute, where due alone to mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballots, should not disfranchise the entire vote of the district and vitiate the election, unless it is made to appear that by reason of the irregularity the result was different from what it would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the candidate for the office.

APPEAL from a judgment of the Superior Court of Kern County. **J. J. Trabucco**, Judge presiding.

The facts are stated in the opinion of the court.

E. L. Foster, for Appellant.

F. E. Borton, and **W. C. Theile**, for Respondent.

SHAW, J.—This is an election contest.

At the general election held in Kern County on November 5, 1912, **H. A. Jastro** was a candidate for supervisor of the fifth supervisorial district of said county, having been duly nominated by both the Republican and Democratic parties of said district. His opponent for election was **J. J. Fitzpatrick**, who ran as an independent candidate. The con-

test is brought pursuant to sections 1111 to 1127 of the Code of Civil Procedure, and prosecuted by plaintiff as a duly qualified elector of the district wherein said election was held. Its purpose, according to the prayer of the complaint, is to have the declaration of the board of supervisors of Kern County, wherein it declared that H. A. Jastro was the duly elected supervisor of said district, held illegal and void and the certificate of election issued by the clerk of said district to Jastro canceled and annulled, and have J. J. Fitzpatrick declared the duly elected supervisor of said district for the term commencing January 1, 1913.

It is conceded that in form the general ballot supplied by the county clerk to the voters of said district complied in all respects with the law, save and except that upon all of the ballots used in said district, and under the designation "Supervisor, Fifth Supervisor District," the name of the contestee was printed twice thereon, as follows: "H. A. Jastro, Democrat," under which and separated by a line was, "H. A. Jastro, Republican," and in each case followed by the required voting square. The name "J. J. Fitzpatrick, Independent," was likewise printed, followed by the required voting square. No question is raised as to the identity of persons, it being stipulated that the H. A. Jastro whose name appears upon the ballot as the Democratic candidate, and the H. A. Jastro whose name appears thereon as the Republican candidate were and are one and the same person.

The sole ground urged by appellant for a reversal is that the name of Jastro should have been printed upon the ballot once only, followed by the designation of the political parties by which he was nominated, thus: "H. A. Jastro, Democrat, Republican," and that under the provisions of sections 1197 and 1211, of the Political Code, as amended in 1911, the printing of contestee's name upon the ballot in the manner stated rendered the ballot void.

"A ballot is a single piece of paper containing the names of the candidates and the offices for which they are designated," (*People v. Holden*, 28 Cal. 123); and if this irregularity in the printing of the names rendered the ballot void, as suggested by appellant, then it must necessarily follow, we think, that there was no election of a supervisor, and the remedy must have been other than that here followed,

wherein contestant seeks to have Fitzpatrick declared the duly elected supervisor upon a ballot claimed to be void. However this may be, we are of the opinion that the case should upon the merits be determined against contestant.

Under section 1196 of the Political Code, it was the duty of the county clerk to provide the printed ballots for use at the election. Section 1197 specifies the form of ballot and, among other things, provides that "in the same line in which the name of the candidate is printed and at the right of the name, or immediately below the name if there shall not be sufficient space to the right thereof, shall be printed . . . the designation of the political party or parties by or on behalf of which such candidate has been nominated. . . ." "The name of the candidate, and the designation of the political party or parties by which he has been nominated shall be printed in a space one-half inch in depth, and shall be defined by light horizontal ruled lines." Section 1211 of the Political Code, provides that "in canvassing the votes any ballot which is not made as provided in this act shall be void."

While there is no positive mandate in the statute against the name of a candidate appearing upon a ballot more than once, it may be conceded that it was the intention of the legislature, as expressed in said section 1197, that where a candidate is the nominee of two or more political parties, his name should appear upon the ballot but once, followed by appropriate words designating him as the candidate of such parties, and that, therefore, the ballot in question was irregular in form. This provision, however, like many other minute directions contained in section 1197, since it does not go to the substance or necessarily affect the result of the election, and is not essential to the validity thereof, should be held directory only. Moreover, the irregularity in the printing of the ballot was due to inadvertence or mistake of those officers whose duty it was to prepare and print it. The voters had nothing to do with the matter. "A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control; such as the exact size of the ticket, the precise kind of paper or the particular character of type or heading used." (McCrary on Elections, sec. 538; *Kirk v. Rhoads*, 46

Cal. 398; *People v. Holden*, 28 Cal. 124.) A failure to comply with some technical direction of the statute, where due alone to mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballot, should not disfranchise the entire vote of the district and vitiate the election, unless it be made to appear that by reason of the irregularity the result was different from what it would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the candidate for the office. (*People v. Los Angeles*, 133 Cal. 346, [65 Pac. 749]; *Inglis v. Shepherd*, 67 Cal. 469, [8 Pac. 5]; *People v. Holden*, 28 Cal. 124; *Murphy v. City of San Luis Obispo*, 119 Cal. 624, [39 L. R. A. 444, 51 Pac. 1085]; *Murphy v. Curry*, 137 Cal. 479, [59 L. R. A. 97, 70 Pac. 461].) The two cases last cited we deem particularly applicable to the facts of the case at bar. There is nothing in the record indicating that the result of the election was in any manner affected by the fact that Jastro's name appeared upon the ballot as "H. A. Jastro, Democrat," and "H. A. Jastro, Republican." The election was a fair and honest expression of choice of the voters of the district whereby each of two thousand persons voted once only for the contestee. Whether they voted for him as a Democrat or as a Republican was immaterial.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 15, 1914.

[Civ. No. 1411. Second Appellate District.—November 18, 1913.]

MARTHA E. MULVEY, et al., Appellants, v. JULIUS WANGENHEIM, as Park Commissioner of the City of San Diego et al., Respondents.

PUBLIC PARK — EXTENSION OF STREET ACROSS — RIGHT OF ABUTTING OWNERS TO INJUNCTION.—Where land has been dedicated solely for purposes of a public park, the extension of a public street across it constitutes a diversion of the land from the uses to which it has been dedicated, and is in violation of the trusts upon which it is held, and may be enjoined at the instance of an abutting owner whose property will thereby be damaged.

ID.—GRANT FOR SPECIFIC PURPOSE — DIVERSION TO DIFFERENT USE.—Where a grant is made for a specified, limited, and definite purpose, the subject of the grant cannot be used for another and a different purpose.

APPEAL from a judgment of the Superior Court of San Diego County. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

Ward, Wells & Ward, and Crouch & Harris, for Appellants.

W. R. Andrews, and A. H. Sweet, for Respondents.

CONREY, P. J.—Judgment of dismissal in this case was entered following an order sustaining demurrers to the amended complaint. Plaintiffs appeal from the judgment.

The object of the action is to obtain an injunction to prevent the construction and grading of a street through Balboa Park, a public park in the city of San Diego. The complaint states facts showing the existence of the park, and that the land across which the proposed street is to be established is a portion of the park; that part of the land in question is included in pueblo lots belonging to the city, which lots have been by certain legislative acts of the city and of the state duly declared to be dedicated, set apart, and held in trust forever by the municipal authorities for use and purposes of a free and public park and for no other or different purpose; that the remainder of the land in question

is held by the city under a deed whereby the grantor sold and conveyed the same for the purpose and upon the condition that it be dedicated to and forever remain a part of the public park of the city and for no other purposes whatever.

The defendants are certain persons constituting the board of park commissioners of the city, and certain individual defendants. The following facts appear from the complaint, which for the purposes of this record must be assumed to be true as stated: There is a park drive along the west line of the park extending southerly to a point some distance north of the point where, for a short distance, plaintiffs' property abuts upon the said westerly line of the park, and thence bears away from the west line and extends in a southeasterly direction through the park to the south line thereof. Sixth Street in the city of San Diego runs in a north and south direction and the northerly portion thereof extends to the southwest corner of the park, and is a public street existing for general street uses. In January, 1912, the defendants, other than the members of said park commission, petitioned the board of park commissioners for permission to open and improve a street along the west side of Balboa Park from the south line of the park northerly to said park drive, so as to connect Sixth Street on the south and said park drive on the north, said petitioners agreeing to pay the cost thereof. That petition having been granted by the board of park commissioners, the said individual defendants entered into a contract with the defendant Goodbody to do the work of opening said street, and he commenced the performance of said contract in accordance with plans and specifications which had been submitted with said petition and approved by the board of park commissioners in connection with its action in granting said petition. It is alleged that "said street is not to be built or constructed for park purposes or for the accommodation or use of the lands dedicated as aforesaid for a public park, and is not needed or necessary or convenient for park purposes, or for the use of said lands, but that the same is to be built and constructed for commercial purposes, to wit: to enhance the value of property on Sixth Street south of the south line of said park belonging to said defendants and others. Said street is to be constructed in order to continue Sixth Street in a

straight and direct line northerly from the south line of said public park to a connection with said park boulevard at Juniper Street, and thence northerly to the north line of said public park, thereby to construct and establish a public street and highway as a continuation of Sixth Street through said Balboa Park in order to make Sixth Street accessible to the northerly portion of said city, and thereby to divert business to Sixth Street and enhance the value of property thereon. That such use of said public park is a violation of the trusts upon which the title is held."

The lots belonging to plaintiffs and fronting for a distance of one hundred and fifty feet along the west line of the park as aforesaid are improved, having thereon a dwelling-house and a barn, which are situate immediately next the east line of their property and adjacent to the west line of the park. Said premises are otherwise improved for residence purposes and have been so occupied by the plaintiffs and their predecessors. Hawthorn Street adjoins the property of plaintiffs on the south and extends from the west line of the park in a westerly direction. Ivy Street lies a short distance north of the property of plaintiffs and extends from the west line of the park in a westerly direction.

The natural surface of the ground as now existing in the western portion of the park adjacent to said streets and property is approximately at the same elevation as said property of plaintiffs and as the existing official and actual grade of said Hawthorn and Ivy streets. The construction of said proposed street, according to said plans and specifications, will make a cut below the official grade of Hawthorn Street of about thirteen feet, and below the official grade of Ivy Street of about six and one-half feet, and will prevent ingress and egress to said park from both of said streets, as well as to and from plaintiffs' property; and will make a cut of from eleven feet to seven and one-half feet along the east line of plaintiffs' property, "thereby removing the lateral and subjacent support of plaintiffs' land and forming a perpendicular declivity and wall from the plaintiffs' east line down to the surface of said street, thereby injuring and damaging plaintiffs' property; . . . the soil along the east line of plaintiffs' property and where said cut is proposed to be made is of such a nature that it will fall of its own weight

into the excavation made for said street and will by the winter rains and storms be washed down therein, when the lateral and subjacent support shall have been removed therefrom, to the injury and damage of plaintiffs' property." Upon the removal of its natural support in the construction of said street the plaintiffs' property will not support the improvements located thereon, and the drainage from plaintiffs' property will be so increased that additional care and irrigation thereof will be required. Said plans and specifications for the construction of said street do not provide for the construction of a retaining wall along the east side of plaintiffs' property, or for holding the soil of plaintiffs' property in place after the removal of said lateral and subjacent support, and make no provision for strengthening the foundations of plaintiffs' buildings or otherwise; and said contract does not provide for any such retaining wall or for any support to hold plaintiffs' land and soil in place, or for strengthening the foundations or otherwise holding the plaintiffs' buildings in place upon the removal of said lateral and subjacent support from plaintiffs' land; and the defendants have not provided for and do not intend to construct any retaining wall or provide any means for said purposes of support. The plaintiffs purchased said property with respect to its location abutting upon said portion of said park and in reliance upon the uses and trusts upon which the title to said park lands is held. No compensation has been provided to be paid to plaintiffs on account of the damage which they claim that they will suffer by the opening and construction of said street.

Upon the facts herein stated we are of the opinion that the acts complained of constitute a diversion of a portion of the park property from the uses to which it has been dedicated, and will be in violation of the trusts upon which said property is held by the city. It is well established that where a grant is made for a specified, limited, and definite purpose, the subject of the grant cannot be used for another and a different purpose. (*Price v. Thompson*, 48 Mo. 361; *Village of Riverside v. MacLean*, 210 Ill. 308, [102 Am. St. Rep. 164, 66 L. R. A. 288, 71 N. E. 408]; *Seward v. City of Orange*, 59 N. J. L. 331, [35 Atl. 799].) In *Village of*

Riverside v. McLean, *supra*, the court said: "It is not altogether clear that the roadway, if extended . . . across this park, will be a pleasure driveway. . . . There is nothing to show that West Avenue, if extended across this park, would be restricted, in the use to be made of it, to a mere pleasure driveway." And it was held that as the premises were originally dedicated for the purposes of a park, and not for the purposes of a traveled roadway, they could not be diverted to such street purposes. In *Seward v. City of Orange*, 59 N. J. L. 331, [35 Atl. 799], the same rule was enforced, the court saying that such a traveled way as there described was not for the use of the park as a park; that on the contrary, it diverts a portion of the park to a wholly different use and a use to which it was not donated.

In the cases above cited the parks were small and the proposed streets affected a much larger proportion of the park area than in the present case; otherwise the cases are parallel, and we see no reason why the same principle should not be applied here.

In this state an important case bearing upon the subject is *Spires v. City of Los Angeles*, 150 Cal. 64, [11 Ann. Cas. 465, 87 Pac. 1026]. There the city owned pueblo land and dedicated it "as a public place forever for the enjoyment of the community in general." Under this dedication, the property having been for a long time in use as a public square or park, it was proposed to construct in the center thereof a public library building. The supreme court held that the establishment of such public library, to which visitors to the park have access, is consistent with the public enjoyment of the park and the construction of the building was permissible. But it was also held that the building must be constructed for strictly library purposes, and that no part of it could be devoted to the establishment of municipal offices therein, or for municipal administration purposes, other than as a meeting place for the board of library directors.

The application to this case of the rule above stated does not in any degree interfere with or deny the full extent of the powers of the board of park commissioners to use the discretion vested in them in the management and control of Balboa Park. For all purposes of administration of the park

property, that board has the right to make or change the improvements appropriate to the park and to determine upon the expediency or necessity of measures relating to the administration thereof. We simply hold that upon the facts, which must be considered as admitted for the purposes of this decision, the proposed work is essentially outside of the scope of any measure of administration of the park, and its execution would constitute fraud in the sense that it would be a violation of a trust.

Plaintiffs further contend that the construction of said street, under the circumstances and in the manner proposed, will be in violation of the provisions of section 14 of article I of the constitution of the state of California, which prohibits the taking or damaging of private property for public use without just compensation having been first made to or paid into court for the owner. Counsel for respondents reply that with respect to the properties described in the complaint, the plaintiffs and the city of San Diego occupy the relation of coterminous owners, and that the city through its board of park commissioners has the right, under section 832 of the Civil Code, "to make proper and usual excavations" on its land "for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other." In view of the conclusions above stated on the other question here discussed, the rule ordinarily applying between coterminous owners is modified with respect to this case. Since the proposed work, when undertaken for the purposes and in the manner shown by the complaint in this action, will result in a damaging of the property of plaintiffs, and since such damage will be incidental to the use by the public of land adjoining the property of the plaintiffs and an application of such adjacent property to a public use not heretofore existing with respect thereto, it follows that the plaintiffs are not required to wait until the injury has been done and then rely upon their right to recover damages therefor. They are entitled to anticipate the impending loss and injury and to have the same prevented by an appropriate order of injunction. (*Schaufele v. Doyle*, 86 Cal. 107, [24 Pac. 834]; *Geurkink v. City of Petaluma*, 112 Cal. 306, [44 Pac. 570]; *Sievers v.*

Root, 10 Cal. App. 337, [101 Pac. 925]; *Wilcox v. Engebretsen*, 160 Cal. 298, [116 Pac. 750].)

The judgment appealed from is reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 1258. Second Appellate District.—November 18, 1913.]

MERCHANTS' MUTUAL ADJUSTING AGENCY (a Corporation), Respondent, v. MOSES DAVIDSON, Appellant.

CORPORATION—STOCKHOLDERS' LIABILITY—CREDITOR'S SUIT—CONDITIONS PRECEDENT.—Where it appears from the allegations of the complaint in an action by a judgment creditor to reach unpaid subscriptions to corporate stock, that the corporation is wholly insolvent and without any assets other than those which the judgment creditor has made a futile attempt to reach by execution, he has done all that he should be required to do as a condition precedent to maintaining the action.

ID.—RETURN OF EXECUTION NULLA BONA—WHEN UNNECESSARY.—The return of an execution *nulla bona* is not a prerequisite to maintaining an action of this character, where the complaint shows that the corporation is wholly insolvent and has no assets upon which to levy an execution.

ID.—ISSUANCE OF STOCK AS PAID-UP—EFFECT OF AGREEMENT TO SUCH EFFECT.—The evidence in this case does not establish an agreement whereby the shares were sold and the certificates issued to the defendant stockholder as "paid up" stock; but conceding such agreement, if made, binding upon the corporation, it could not affect the rights of the plaintiff as a judgment creditor of the insolvent corporation to enforce payment to it of the full par value of the stock less the price actually paid therefor. This is upon the doctrine of the so-called trust fund theory.

ID.—INSOLVENT CORPORATION—TRUST FUND THEORY.—The assets of an insolvent corporation, in whatever form, are held in trust for its creditors. Among such assets are unpaid balances consisting of the difference between the par value of the stock and the amount actually paid therefor by the purchaser from the corporation, as to the payment of which, so far as the creditor is concerned, the obligation is unconditional, even though the corporation has, in selling the stock, accepted a qualified liability whereby it is estopped from enforcing payment of the balance.

ID.—FINANCIAL EMBARRASSMENT OF CORPORATION—SALE OF STOCK TO RELIEVE.—The rights of a creditor of the insolvent corporation are not affected by the fact that the corporation, when it sold the stock, was in financial straits, and made the sale in good faith to relieve its embarrassment.

APPEAL from a judgment of the Superior Court of Tulare County. J. A. Allen, Judge.

The facts are stated in the opinion of the court.

E. I. Feemster, for Appellant.

Lamberson & Lamberson, and **James M. Burke**, for Respondent.

SHAW, J.—This is an action by a judgment creditor of the Visalia Publishing House, a corporation, to collect from defendant as a stockholder therein an unpaid balance alleged to be due from him to the corporation upon shares of the stock therein, the corporation being insolvent.

Defendant appeals from a judgment rendered in favor of plaintiff.

While the corporation was a going concern defendant purchased from it shares of its capital stock of the par value of one thousand dollars, for which he paid two hundred and fifty dollars and has paid no more.

The first point urged by defendant for a reversal is that by reason of the fact that the issuance of an execution upon the judgment obtained against the corporation and a return of *nulla bona* thereon by the sheriff is not alleged, the complaint fails to show that plaintiff prior to the bringing of this action had exhausted its legal remedies in an effort to collect the judgment obtained against the publishing house, and therefore the general demurrer interposed by defendant should have been sustained. While it is true the complaint did not allege the return of an execution *nulla bona*, it did allege that on the fifteenth day of February, 1910, plaintiff obtained judgment against the corporation for the sum of \$1,514.63; that at the time of the recovery of said judgment and at all times thereafter said publishing house was insolvent and neither owned nor had any property whatsoever, save and except the sum of seven hundred and fifty

dollars due from defendant herein on account of the alleged balance due for the purchase of shares of capital stock of said publishing house, and a similar debt due from one J. H. Butler in the sum of eight hundred and fifty dollars (for the recovery of which an action was pending); that on May 21, 1910, plaintiff caused a writ of execution to be issued upon said judgment so obtained against said publishing house and delivered it to the sheriff of the county, directing him by virtue thereof to levy upon all moneys, goods, and effects in the possession, under the control of or due from said defendant Davidson and J. H. Butler, together with all sums due and owing from them or either of them to said publishing house upon the capital stock of said Visalia Publishing House held or owned by them; "that said sheriff made due and legal service of said writ of execution, together with a notice of garnishment, upon the said Moses Davidson, the defendant herein, and the said J. H. Butler; that the said defendant Moses Davidson and the said J. H. Butler each separately made answer to said writ of execution and notice of garnishment in writing, and therein denied he was indebted to the said Visalia Publishing House in any sum, or that he had any moneys, goods, or effects due or owing to the said Visalia Publishing House in his possession or under his control," which said execution the sheriff returned with said written denials of Davidson and Butler attached thereto.

It seems to be the general rule that a creditor's claim must be reduced to judgment and execution thereon issued and returned unsatisfied before he can invoke the aid of equity in enforcing collection. (Cook on Corporations, sec. 200; Pomeroy's Equity Jurisprudence, sec. 1415.) That one adopting such course has exhausted his legal remedies admits of no doubt. Where, however, it appears, as here, from the allegations of the complaint that the corporation is wholly insolvent and without any assets other than those which the judgment creditor has made a futile attempt to reach by execution, he has done all that he should be required to do as a condition precedent to maintaining the action. As was said by Chancellor Kent: "It is one of the maxims of the common law, which is a dictate of common sense, that the law will not attempt to do an act which is vain, or to enforce an act which would be fruitless." The basis of the action is the insolvency of the

corporation. "A judgment and execution unsatisfied are evidence of insolvency, of inability to collect. They are, however, evidence only; and the fact may be established as well by other evidence, among other modes, by an assignment and continued suspension of business, or other notorious indications." (*Terry v. Tubman*, 92 U. S. 158, [23 L. Ed. 537].) In *Andrews v. O'Reilly*, 25 R. I. 231, [55 Atl. 688], the supreme court of Rhode Island, in discussing a question identical with that involved here, said: "We think, in the action to enforce the stockholder's liability, it is sufficient to allege that the creditor has exhausted all remedies which could have been fruitful, and not necessarily all remedies of mere form. The remedy of attempted levy of an execution, when it is certain in advance that nothing can come of it, is not required by the reason of the rule. The plaintiff here has alleged that a judgment against the corporation is unsatisfied because the corporation is insolvent and has no property on which an execution can be levied. If he proves this at the trial, why should he not recover his debt of the stockholder? The best and conclusive proof of the fact that the corporation has no property is the return of an officer to that effect, but he may be able to offer other proof which will be convincing. The thing involved is the impossibility of recovering the judgment from the principal debtor. The means by which this impossibility is demonstrated are of minor consequence. Even where the statute expressly provided that 'no suit shall be brought against any stockholder,' etc., 'until an execution against the company has been returned unsatisfied in whole or in part,' it was held by the supreme court of the United States in *Flash v. Conn*, 109 U. S. 371, [27 L. Ed. 966, 3 Sup. Ct. Rep. 263], following *Shellington v. Howland*, 53 N. Y. 371, that an adjudication in bankruptcy of the company excused a compliance with this condition." To the same effect is *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah, 423, [45 Pac. 200], and *Hodges v. Silver Hill Min. Co.*, 9 Or. 200. In our opinion, the return of an execution *nulla bona* as a prerequisite to maintaining an action of this character is not required where the complaint shows that the corporation is wholly insolvent and has no assets upon which to levy an execution. Since it appears that plaintiff exhausted all legal remedies which under the circumstances alleged could have been fruit-

ful or availed it in any manner, its right to pursue the stockholder upon his liability for the unpaid balance due the corporation is not affected by the fact that it failed in a matter of mere form to do a vain and idle act.

Appellant attacks the finding "that neither the whole nor any part of the balance of seven hundred and fifty dollars remaining unpaid upon his said purchase of the capital stock of said corporation, as above set forth, has ever been paid, and that the whole of said amount, to wit: the seven hundred and fifty dollars has been, ever since the date of said purchase, and is now due, owing and unpaid from said defendant to said Visalia Publishing House," claiming that it is wholly without support. The evidence shows that at the time of the purchase of the shares of stock by defendant the corporation was badly in need of cash wherewith to conduct its business; that of its original capital it sold to Davidson, one of its stockholders, one thousand shares of stock, of the par value of one thousand dollars, for the sum of two hundred and fifty dollars paid in cash. As shown by the minutes of the proceedings of the board of directors, the secretary, who negotiated the sale, reported to the board of directors "the sale to M. Davidson of Porterville of 1000 shares of the stock of the corporation at 25 cents, for the purpose of raising money to meet a bill of one of the San Francisco paper houses. . . . On motion of B. U. Heberling, duly seconded and carried, the sale to M. Davidson was duly ratified." While the secretary testifies that the stock was issued as "paid up" stock, no indorsement of such fact appeared upon the certificates, and so far as disclosed by the record nothing whatever was said by Davidson, the corporation, or any of its officers, touching the question of his liability for further payments, or which could be construed as an agreement releasing him from the obligation implied by such purchase, though one of the directors testifies: "My recollection is that he was not expected to pay more than that." Davidson says that he did not in terms agree at the time to pay more than two hundred and fifty dollars for the stock. In effect the evidence shows that defendant bought from the corporation shares of its stock, paying therefor twenty-five per cent of its par value, nothing whatever being said touching the question as to payment of the balance. While in our opinion the evidence fails

to establish an agreement whereby the shares were sold and certificates therefor issued to defendant as "paid up" stock, nevertheless, while conceding such agreement, if made, binding upon the corporation, it could not affect the rights of plaintiff as a judgment creditor of the insolvent corporation to enforce payment to it of the full par value of the stock less the price actually paid therefor. This upon the doctrine of the so-called trust fund theory, first announced by Judge Story in the case of *Wood v. Dummer*, 3 Mason 308, [Fed. Cas. No. 17,944]; namely: that the assets of an insolvent corporation in whatever form are held in trust for its creditors. Among such assets are unpaid balances consisting of the difference between the par value of the stock and the amount actually paid therefor by the purchaser from the corporation, as to payment of which, so far as the creditor is concerned, the obligation is unconditional, even though the corporation has in selling the stock accepted a qualified liability whereby it is estopped from enforcing payment of the balance. (*Herion Co. v. Shaw*, 165 Cal. 668, [133 Pac. 491]; *Vermont etc. Co. v. Declez etc. Co.*, 135 Cal. 579, [87 Am. St. Rep. 143, 56 L. R. A. 728, 67 Pac. 1057]; *Cook on Corporations*, sec. 42; *Sawyer v. Hoag*, 17 Wall. 610, [21 L. Ed. 731]; *Upton v. Tribilcock*, 91 U. S. 48, [23 L. Ed. 203]; 2 *Thompson on Corporations*, secs. 1564, 1567; *Morawetz on Corporations*, sec. 842.) Appellant lays much stress upon the fact that the corporation had pressing obligations and that the stock was sold at its full market value for the purpose of raising money to meet its financial necessities. His claim, based upon *Handley v. Stutz*, 139 U. S. 417, [35 L. Ed. 227, 11 Sup. Ct. Rep. 530]; *Clark v. Bever*, 139 U. S. 96 [35 L. Ed. 88, 11 Sup. Ct. Rep. 468], and *Fogg v. Blair*, 139 U. S. 118, [35 L. Ed. 104, 11 Sup. Ct. Rep. 476], is that where a corporation sells its stock in good faith at less than par in order to procure necessary capital wherewith to conduct its business, creditors, in the event of the insolvency of the corporation, cannot enforce payment of unpaid balances from such purchasers. The cases relied upon by appellant were based upon peculiar facts which, in the opinion of the court, constituted an exception to the general rule. We confess our inability to perceive any ground for the distinction drawn or reason why the creditor of an insolvent corporation should be precluded from recovery be-

cause the corporation when it sold the stock was in financial straits and the sale made in good faith to relieve its embarrassment. Such ruling if adhered to must necessarily lead to great and inevitable confusion. Moreover, in view of the California citations, the cases cited cannot be deemed authority in support of such contention. It is worthy of note that in the later case of *Camden v. Stuart*, 144 U. S. 104, [36 L. Ed. 363, 12 Sup. Ct. Rep. 585], the author of the opinion in *Handley v. Stutz*, said: "It is the settled doctrine of this court that the trust arising in favor of creditors by subscription to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark v. Bever*, *Fogg v. Blair*, or *Handley v. Stutz*, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock." As to the right of creditors of an insolvent corporation to enforce such payment, no distinction can be drawn between the case of one who in form subscribes for original stock, agreeing to pay less than its par value therefor, and one who purchases original stock at less than its par value.

Our conclusion renders it unnecessary to discuss other points made by appellant.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1273. First Appellate District.—November 19, 1913.]

BENJAMIN F. STRANGE, Respondent, v. **MARGUERITE A. STRANGE et al.**, Defendants; **MARGUERITE A. STRANGE**, Defendant and Appellant.

NEW TRIAL—OMISSION OF SPECIFICATIONS FROM NOTICE—TIME FOR AMENDMENT.—The moving party for a new trial is not entitled, thirty-three days after receiving notice of the entry of judgment and twenty-one days after filing and serving his notice of intention to move for a new trial, to amend his notice of intention by supplying specifications of the particulars in which the evidence is alleged to be insufficient, and also specifications of errors of law upon which he will rely, both of which specifications were entirely omitted from his original notice.

ID.—MOTION FOR NEW TRIAL—OMISSION OF SPECIFICATIONS AS TO INSUFFICIENCY OF EVIDENCE.—A motion for a new trial, based upon a notice which fails to contain any specification of particulars in which the evidence is alleged to be insufficient, cannot be granted upon that ground.

ID.—NOTICE OF MOTION—SPECIFICATION OF PARTICULARS—NEW METHOD OF APPEAL.—The alternative method of appeal provided by section 953a of the Code of Civil Procedure does not relieve the moving party for a new trial from the necessity of specifying in his notice of intention the particulars in which he intends to urge that during the trial the court has erred in matters of law.

ID.—MOTION FOR NEW TRIAL ON GROUND OF NEWLY DISCOVERED EVIDENCE—TIME FOR FILING AFFIDAVITS.—Where one moves for a new trial upon the grounds of accident, surprise, and newly discovered evidence, it is incumbent upon him, within ten days after the date of the service and filing of his notice of intention, to either serve and file his affidavits in support of the proposed motion, or to obtain a stipulation or order granting further time so to do.

SUIT TO QUIET TITLE—EVIDENCE—BURDEN OF PROOF.—Where the defendant, in an action involving title to land, bases his claim of title on a deed from the plaintiff, the plaintiff is not required to prove title in himself prior to the date of such deed.

ID.—CONFLICTING EVIDENCE—CONCLUSIVENESS ON APPEAL.—A finding of the court in such action as to the intention of the grantor in delivering such deed, based on evidence substantially conflicting, will not be disturbed on appeal.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco and from orders made in

the matter of a motion for a new trial. H. D. Burroughs, Judge presiding.

The facts are stated in the opinion of the court.

John H. Crabbe, and E. B. Mering, for Appellant.

James H. Boyer, for Respondent.

RICHARDS, J.—The appellant prosecutes herein three appeals—one from an order denying appellant's motion for leave to amend her notice of intention to move for a new trial; one from an order denying appellant's motion for a new trial, and one from the judgment. They will be considered in the above order.

The order of the trial court refusing appellant leave to amend her notice of intention to move for a new trial was based on the objection that appellant's notice of motion for leave to amend her notice of intention was served and filed thirty-three days after appellant had duly received written notice of the entry of judgment, and twenty-one days after appellant's notice of intention to move for a new trial had been served and filed; and that since by said motion for leave to amend her notice of intention to move for a new trial appellant sought to supply specifications of the particulars in which the evidence was alleged to be insufficient, and also specifications of errors of law upon which the appellant would rely, and both of which specifications were entirely omitted from her original notice, the proffered amendment came too late, and that the court had no longer jurisdiction to grant leave to amend her notice of intention to move for a new trial in the respects sought by said motion.

It is to be noted that appellant's motion for leave to amend was not made upon the ground of mistake, inadvertence, surprise, or excusable neglect. That the court committed no error in sustaining the respondent's objection and refusing appellant leave to amend her notice of intention to move for a new trial in the respects indicated, would seem to be the settled law of this state. (*Union Collection Co. v. Oliver*, 162 Cal. 755, [124 Pac. 435]; *Little v. Jacks*, 67 Cal. 165, [7 Pac. 449]; *Parker v. Doray*, 98 Cal. 317, [33 Pac. 118]; *Salisbury v. Burr*, 114 Cal. 451, [46 Pac. 270]; *Estudillo v. Security*

Loan Co., 158 Cal. 67, [109 Pac. 884]; *National Bank of Cal. v. Mulford*, 17 Cal. App. 551, [120 Pac. 446].)

Appellant's motion for a new trial being thus based upon a notice which failed to contain any specification of particulars in which the evidence was alleged to be insufficient could not have been granted upon that ground. (Code Civ. Proc., sec. 659.)

Said notice of intention also failed to specify the particular errors of law occurring at the trial and excepted to by the appellant. Counsel for the appellant contends that since the adoption of the alternative method of appeal provided for in section 953a of the Code of Civil Procedure, which enables the appellant to present to the appellate court the reporter's transcript "of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions taken and all matters to which the same relate," and which also provides that such transcript is to be considered on appeal in lieu of a bill of exceptions, the reason for the specification of the particular errors of law required by section 659 of the Code of Civil Procedure, no longer exists, and that the decisions of the court requiring such specifications rendered prior to the adoption of section 953a of the Code of Civil Procedure, no longer apply.

We have read the elaborate, insistent, and extended argument of counsel in support of this contention, but we cannot give our concurrence to its conclusions. On the contrary, it would seem that the amendment of section 647 of the Code of Civil Procedure so as no longer to require exceptions to the rulings of the court during the trial to be taken or noted, when read in connection with the change in method of preparing the record on appeal worked by the adoption of section 953a of the same code, would furnish an additional and stronger reason for a strict adherence to the rule that the moving party on a motion for a new trial should be required to specify in his notice of intention the particulars in which he intends to urge that during the trial the court has erred in matters of law.

An examination of the cases decided since the adoption of section 953a of the Code of Civil Procedure will show that the courts have consistently adhered to the former well established

rule. (*Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435]; *National Bank of Cal. v. Mulford*, 17 Cal. App. 551, [120 Pac. 446].)

The motion for a new trial, in so far as it was based upon unspecified errors of law, was also properly denied.

The appellant's motion for a new trial was also to be based upon the grounds of accident, surprise, and newly discovered evidence. It was incumbent upon the appellant, within ten days after September 9th, the date of the service and filing of her said notice of intention, to either serve and file her affidavits in support of this branch of her proposed motion, or to obtain a stipulation or order granting her further time so to do. Such affidavits were not served nor filed until September 25th—eighteen days after the service and filing of the notice of intention, and no stipulation or order extending the time within which to serve and file these affidavits was ever applied for or made. It is clear, therefore, that they came too late to be available upon the motion for a new trial over an objection to their use.

The record, however, shows that not only was no objection made to the use of these affidavits, but that they were in fact offered, read, and considered by the court upon said motion. This being so, we have considered them here; but having done so, we fail to find in their contents any sufficient ground for granting a new trial.

This leaves the appeal from the judgment as the only matter remaining for consideration in this case.

The contention of the respondent that the notice of intention to appeal was filed too late is without merit; and the only substantial question presented upon the appeal is as to whether the evidence is sufficient to sustain the judgment.

The sole claim of title which the appellant asserts to the property in question in her answer and cross-complaint is that derived by a deed from plaintiff to her and her codefendant dated October 20, 1908. This being so, it was not required by plaintiff that he should prove title in himself prior to the date of said deed; and hence, the only real issue in the case was as to the intention of the grantor with respect to the delivery of the deed. The grantor of the instrument being the plaintiff in the case, and having affirmatively testified that he had never delivered nor intended to deliver said deed, nor to

part with his title or control over the property during his lifetime; and his testimony in these respects being strongly supported by other evidence in the case, we are satisfied that there is such a substantial conflict in the evidence as to preclude us from disturbing the findings and judgment of the court below.

The judgment and several orders appealed from herein are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 19, 1913, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 17, 1914.

[Civ. No. 1285. First Appellate District.—November 19, 1913.]

In the Matter of the Estate of BETHANIA DUNBAR WILLIAMS, Deceased. DONALD WARD WILLIAMS, as Executor of the Will of Bethania Dunbar Williams, Deceased et al., Appellants, v. JOHN E. McDOUGALD, as Treasurer of the City and County of San Francisco, Respondent.

INHERITANCE TAX—DEATH OF DEVISEE SUBJECT TO TAX—COMPUTATION OF SECOND TAX.—Where a testator dies leaving his estate to a devisee who is subject to an inheritance tax, and the devisee then dies leaving an estate the residuary devisees of which are also subject to an inheritance tax, the first inheritance tax is to be deducted from the amount of the second estate, in computing the second tax.

ID.—DETERMINATION OF VALUE OF ESTATE—DEDUCTION OF LIENS AND DEBTS.—In making his appraisal of the market value of devised or inherited property an inheritance tax appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it.

ID.—TAX IMPOSED ONLY UPON SO MUCH PROPERTY AS COMES TO DISTRIBUTEE.—The inheritance tax is imposed solely upon the devisee, legatee, or heir, and upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir.

APPEAL from an order of the Superior Court of the City and County of San Francisco settling the report of an inheritance tax appraiser and fixing the amount of the inheritance tax. J. V. Coffey, Judge.

The facts are stated in the opinion of the court.

Percy E. Towne, for Appellants.

Hartley F. Peart, and U. S. Webb, Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from an order settling an inheritance tax, appraiser's report, and fixing the amount of the inheritance tax to be paid by the appellants as the residuary legatees and devisees of Bethania Dunbar Williams, deceased.

The facts are these: Abram P. Williams died testate in the city and county of San Francisco in October, 1911, leaving a will by which he devised his entire estate to his widow Bethania Dunbar Williams. This will was duly admitted to probate, and the widow was appointed executrix thereof, and continued to serve as such until her death in April, 1912. She also left a will, of which Donald Ward Williams, one of the appellants herein, was named and thereafter duly appointed executor; and in which will, after numerous legacies, the said Donald Ward Williams and Harry McFarland Williams were named as the residuary legatees of her estate.

An inheritance tax was duly appraised upon the estate of Abram P. Williams and fixed at the net sum of \$18,475.03, chargeable against Bethania Dunbar Williams as the sole devisee of the estate, which said sum was paid by Donald Ward Williams as administrator with the will annexed of the estate of Abram P. Williams, deceased.

The residuary interests of Donald Ward Williams and Harry McFarland Williams being also subject to an inheritance tax, the appraiser, John M. Burnett, in September, 1912, proceeded to appraise and fix such tax; and in so doing declined to deduct from his appraisal of the market value of said interests of said residuary devisees the amount of the first inheritance tax—namely, the sum of \$18,475.03, but, on

the contrary, fixed the amount of their inheritance tax at a sum \$3,695 in excess of what it would have been if such first inheritance tax had been deducted. This report the lower court adopted, and from its order approving the same this appeal has been taken.

The sole question before the court for decision is this: Where a testator dies leaving his estate to a devisee who is subject to an inheritance tax, and he also dies leaving in turn an estate, the residuary devisees of which are also subject to an inheritance tax, is the first inheritance tax to be deducted by the appraiser from the amount of the second estate upon which such second inheritance tax is to be computed?

This question would have been a simple one if Bethania Dunbar Williams had in her lifetime paid the inheritance tax of \$18,475.03 appraised against her as the sole devisee of Abram P. Williams, deceased; and it would seem to be immaterial whether she had so paid it personally and out of her individual funds, or whether she had paid it as executrix of the estate of her husband and out of the funds of the estate of which she was the sole devisee; and as, under the law, she was entitled and even bound to do. (Inheritance Tax Law, 1911, sec. 1, subd. 4, Stats. 1911, p. 713.) It would seem obvious that had she done this before her death, the amount of this inheritance tax so paid could never have come within the range of consideration as a part of the estate of the devisees of Bethania Dunbar Williams. The mere fact that Bethania Dunbar Williams died before paying the inheritance tax which she was bound to pay as a condition precedent to receiving her interest in the estate of Abram P. Williams as the sole devisee thereof, and which tax was a fixed charge and lien upon her devisable interest in the estate, ought not to change the rule, for the simple reason that in either event her devisees could never be entitled to receive any portion of the said sum of \$18,475.03 which had already and before her death been laid hold upon and sequestered by law for the payment of said tax.

The foregoing chain of reasoning is sustained and strengthened by an examination of the Inheritance Tax Law and the cases which have undertaken to construe its terms.

Section 1 of the Inheritance Tax Law requires that the tax shall be imposed upon the transfer of any property by will or by the intestate or homestead laws of the state, and subdi-

vision 4 of the same section provides "that the tax so imposed shall be upon the market value of such property." In a very early case it was held that the universal standard of value for purposes of taxation is the amount of money which can be realized by a sale of the property in the open market. (*State v. Moore*, 12 Cal. 56.) This is also the code rule for admeasuring the value of property in actions for damages for its wrongful conversion. (Civ. Code, secs. 3353, 3354.)

Measured by this rule the market value of property which one receives by inheritance or devise should be the cash price for which it could be sold in the open market; and if this be true it would be idle to argue that the value of a devisee's interest in an estate would not in any sale thereof be discounted to the extent of any outstanding inheritance tax lien against it.

But the Inheritance Tax Law goes further; and in section 15 provides that "In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent encumbrance thereon, nor on account of any contingency upon the happening of which the estate or property, or some part thereof or interest therein, may be abridged, defeated, or diminished, provided, however, that in the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat, or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the encumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of cash shall be made in the manner provided by section 12 hereof upon order of the court having jurisdiction."

Section 12 of the Inheritance Tax Law further provides: "Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted, or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so de-

ducted or paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer or to the state treasurer, or by said county treasurer or said state treasurer, if it has been so paid."

From these sections of the act the plain implication arises that in making his appraisal of the market value of devised or inherited property the appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it. This is evidently the view taken by our supreme court in the *Estate of Kennedy*, 157 Cal. 517, [29 L. R. A. (N. S.) 428, 108 Pac. 280], wherein, after a careful review of practically all of the cases cited by respective counsel in their briefs herein, the court says: "The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee or heir. It would be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes and can never be distributed to him."

It would seem to be equally absurd and unjust to refuse to allow for and deduct from the value of the share of the devisee of an estate the amount of an inheritance tax which had been affixed to said property while it was part of a preceding estate, and which was a lien upon it, and which the executor or administrator of the former estate was bound by law to pay, and which could therefore never come into the possession or enjoyment of the devisee.

This was what was done in the present case. We think the order of the court approving the report of the appraiser was erroneous, and should be reversed, with instructions to the court to enter an order assessing and fixing the market value of the property of the appellants subject to the inheritance tax herein, and the amount of such tax to which the same is liable, in conformity with the views expressed in this opinion; and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

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[Crim. No. 310. Second Appellate District.—November 19, 1913.]

THE PEOPLE, Appellant, v. L. E. DADMUN, Respondent.

CRIMINAL LAW—LARCENY—THEFT OF DEED BY GRANTEE—INDICTMENT.—

An indictment charging the grantee named in a deed with grand larceny in stealing and carrying away the deed, which, if properly delivered, was sufficient to convey the title to the property described therein, and alleging the value of the property but not the value of the deed, is demurrable.

ID.—THEFT OF INSTRUMENT OR DOCUMENT—SECTION 492 OF PENAL CODE.

Section 492 of the Penal Code, providing that "if the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen," does not purport to define any offense, but merely prescribes a rule of evidence for ascertaining and fixing the value of the article stolen.

ID.—MEANING OF "WRITTEN INSTRUMENT"—NECESSITY OF DELIVERY.—

The term "written instrument" means a written document, delivered with the intention that it shall take effect in accordance with its purpose as shown by the language used therein; the use of the word with respect to contracts and deeds of conveyance of real estate implies a delivery, without which the document is inoperative for any purpose.

ID.—UNDELIVERED DEED—WHETHER A SUBJECT OF LARCENY.—An undelivered deed is not a "written instrument" within the meaning of section 492 of the Penal Code, and is not a subject of larceny.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, George Beebe, Deputy Attorney-General, and H. S. Utey, District Attorney, for Appellant.

E. S. Torrance, for Respondent.

SHAW, J.—An indictment presented by the grand jury against defendant charged him with grand larceny in that

it is alleged that he "did willfully, unlawfully and feloniously steal and carry away a certain" grant deed signed and acknowledged by one George W. Webb, wherein defendant was named as grantee, which deed, if properly delivered, was sufficient in form and substance to convey to defendant the title of Webb to the property described therein, alleged to be of the value of ten thousand dollars, which "grant deed and the said property therein described and the title to which was thereby shown and conveyed," as alleged, "was then and there the property of said George W. Webb, and which said deed was "a written instrument showing and conveying the title to certain real property" therein described.

The sustaining of defendant's demurrer followed by judgment thereon, from which the people appeal, presents the question as to whether or not the stealing of a grant deed by one named therein as grantee (the value of the property described therein, and not the value of the deed, being alleged) constitutes grand larceny. The contention of appellant is that the indictment charges the offense of grand larceny under and pursuant to the provisions of section 492 of the Penal Code, which is as follows: "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen." This section does not purport to define any offense, but merely prescribes a rule of evidence for ascertaining and fixing the value of the article stolen. The offense, as defined by section 484 of the Penal Code, consists in "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." When the property thus taken is of a value exceeding fifty dollars it constitutes grand larceny. (Pen. Code, sec. 487.) If it be of a value of less than fifty dollars, unless the act falls within the provisions of subdivisions 1 and 2 of said section 487, it is petit larceny. The value of the article stolen, as alleged in the indictment, fixes the grade of the offense.

If the deed was delivered, and respondent insists that such fact is implied from the allegation that it "showed and con-

veyed title to the real property therein described," then of course no offense is charged. On the other hand, assuming the deed was not delivered, was it "a written instrument" within the meaning of those words as used in the section quoted? If not, then it follows that the stealing of the deed was merely the unlawful taking of an article having no value other than that of the paper and labor performed in writing thereon, the value of which is not stated. In *Hoag v. Howard*, 55 Cal. 564, the word "instrument," as used in the codes, is defined as "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty." This definition is quoted with approval in *Foorman v. Wallace*, 75 Cal. 555, [17 Pac. 680], and *Warnock v. Harlow*, 96 Cal. 307, [31 Am. St. Rep. 209, 31 Pac. 166]. The term "written instrument" means a written document delivered with the intention that it shall take effect in accordance with its purpose as shown by the language used therein. The use of the word with respect to contracts and deeds of conveyance of real estate implies a delivery without which the document is inoperative for any purpose. (Civ. Code, secs. 1626 and 1054.) Since the document was not delivered, it was not a written instrument, but merely a piece of paper with writing thereon, ineffectual and inoperative for the purpose of conveying the property described therein. It appears the legislature recognized the fact that documents and writings inoperative for want of delivery could not, in the absence of positive law, be the subject of larceny as "written instruments," for section 494 of the Penal Code provides: "All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner." In this enumeration of undelivered instruments which are made the subject of larceny deeds are not designated therein, and applying the maxim that "the expression of one thing excludes another," they should not be included among the undelivered instruments to which the provisions of the section are said to apply. The provision of the New York code [N. Y. Consol. Laws, c. 40, sec. 1303] with

reference to larceny of written instruments, while almost identical with our own, is more favorable to respondent's contention in that the New York statute describes the instrument as one "being the transfer of or evidence of title to any property," and providing that the value of the article stolen shall be deemed "the value of the property transferred or affected, or the title to which is shown thereby." In the case of *People v. Stevens*, 38 Hun (N. Y.), 62, the question involved the alleged larceny from the maker thereof of a written instrument consisting of the satisfaction of a mortgage, and it was there held that the act of taking did not constitute larceny for the reason that an undelivered instrument of such nature is not the subject of larceny. In discussing the question the court said: "It is the general rule that to constitute larceny of a written instrument, the paper must be effective and operative when taken. Was this instrument effective and operative for any purpose when the defendant acquired the possession? I think not. It had never been delivered, nor was it intended to be used for the purpose therein mentioned until the performance of certain things thereafter to take place. The debt it was intended to secure remained unpaid. The possession of the paper by the defendant did not, nor did its record, and could not in law, release the debt nor discharge the land from the mortgage lien. Until the instrument was delivered to some one by the maker for the uses and purposes expressed therein, it possessed no value and was not personal property, in the sense and meaning of that term as defined by the statute. The instrument, although complete in form and bearing the signature of the mortgagee and duly acknowledged, ready to be delivered and used according to its design, could not, while in this state, be the subject of larceny." The facts in the case at bar are almost identical with those under discussion by the New York court, and the language is peculiarly applicable thereto. (See, also, *People v. Loomis*, 4 Denio (N. Y.), 380.)

Counsel for appellant in support of their contention cite cases from other jurisdictions, but an examination of the statutes upon which such decisions are based shows that they have no application to cases arising under the provisions of our code. Thus, in a Missouri case, defendant was indicted under a section of the code of that state which provided that the

felonious taking of any instrument in writing which was the *act of another* constituted larceny, and the court there held that the question of the delivery of the deed was immaterial.

The deed herein alleged to have been stolen, as shown by the indictment, had never been delivered, and hence was not a "written instrument" within the meaning of section 492 of the Penal Code. Defendant acquired no title to the property therein described, nor under the circumstances could it be considered competent evidence of any right whatsoever vested in him by the same.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 17, 1914.

[Civ. No. 1218. First Appellate District.—November 20, 1913.]

R. L. DOUGLAS, Respondent, v. F. SPANGENBERG,
Appellant.

BROKER—COMMISSION FOR SALE OF REAL ESTATE—PRODUCTION OF PURCHASER.—A broker's contract for the sale of real estate is not performed, nor is his commission earned, until it affirmatively appears that he has procured and secured a purchaser ready, willing, and able to buy the property offered for sale upon the terms and conditions and at the price fixed by the owner.

ID.—COMMISSION—WHAT MUST BE DONE IN ORDER TO EARN.—Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser an enforceable contract binding him to purchase the property offered for sale at the price and upon the terms specified by the owner or assented to by him; or, in the absence of such a contract, by proof of the fact that the broker brought the owner and prospective purchaser together for the purpose of consummating a contract of sale at the price and upon the terms proposed or assented to by the owner, and that the owner declined to proceed with the sale upon such terms.

ID.—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.—In this action by a broker against his principal for commissions alleged to

have been earned in procuring a purchaser for real estate, the evidence fails to show that the broker procured a purchaser who was ready, able, and willing to buy upon the terms originally authorized by the principal, or upon other and different terms proposed by the broker and subsequently accepted and ratified by the principal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

F. J. Castelhun, for Appellant.

Percy E. Towne, for Respondent.

LENNON, P. J.—This is an appeal from the judgment and from an order denying a new trial.

The plaintiff had judgment against the defendant in the sum of \$1,690, alleged to have been earned by the plaintiff as a broker's commission in procuring a purchaser for certain real estate belonging to the defendant.

The facts in the case as revealed by the pleadings and proof are substantially these:

On December 5, 1910, the defendant, by an instrument in writing, authorized the plaintiff to offer for sale a tract of land in Tehama County containing three hundred and forty acres. By the terms of the authorization the plaintiff was empowered to offer the entire tract for sale at \$52.50 per acre, upon the express condition that "not less than seven thousand five hundred dollars cash in United States gold coin" should be paid down, and the "balance as may be mutually agreed upon."

The complaint proceeded upon the theory that plaintiff had procured a purchaser for defendant's lands at fifty-five dollars per acre, who was ready, willing, and able to buy, and who, as an evidence of good faith, had deposited with the plaintiff the sum of one thousand dollars in cash as the first payment on account of the purchase price. The complaint further alleged that the plaintiff had reported to defendant the procurement of this particular purchaser and the payment of one thousand dollars in cash, and that the defendant in writing had approved the acceptance by plaintiff of the one thousand

dollars cash deposit, and ratified in writing the other terms and conditions of the sale, notwithstanding that they were at variance with the terms and conditions of sale specified in the original authorization.

The trial court found as a fact that the plaintiff had sold the defendant's lands at the price of fifty-five dollars per acre to a prospective purchaser, who had paid one thousand dollars on account of the purchase price, and that such purchaser was ready, able, and willing to complete the purchase upon the terms proposed by plaintiff and assented to in writing by the defendant. The insufficiency of the evidence to justify this finding is one of the grounds for defendant's motion for a new trial, and is now urged as a reason for reversing the judgment. In this behalf it is the defendant's contention that plaintiff's evidence fails to show, as plaintiff alleged, that he had procured a purchaser for defendant's lands who was ready, able, and willing to purchase them upon the terms originally proposed by the defendant, or upon other and different terms proposed by the plaintiff and which were subsequently accepted and ratified in writing by the defendant.

This contention must be sustained.

A broker's contract for the sale of real estate is not performed, nor is his commission earned, until it affirmatively appears that he has procured and secured a purchaser ready, willing, and able to buy the property offered for sale upon the terms and conditions and at the price fixed by the owner. Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser an enforceable contract binding him to purchase the property offered for sale at the price and upon the terms specified by the owner or assented to by him; or, in the absence of such a contract, by proof of the fact that the broker brought the owner and prospective purchaser together for the purpose of consummating a contract of sale at the price and upon the terms proposed or assented to by the owner, and that the owner declined to proceed with the sale upon such terms.

No such showing was made in the present case. On the contrary, the evidence shows without conflict that the plaintiff procured a purchaser named Ordway for the defendant's land upon terms essentially different from those originally authorized by the defendant. Clearly the original authorization to

plaintiff did not empower him to accept any sum less than seven thousand five hundred dollars in cash on account of the purchase price, nor authorize him to make any terms with reference to the time and manner of payment of the balance of the purchase price which would not meet with the approval of the defendant. Notwithstanding the express limitation upon the authority of the plaintiff he procured and accepted from Ordway, the prospective purchaser, a contract to purchase which provided for a first payment on account of the purchase price of only one thousand dollars, and prescribed conditions for the payment of the balance of the purchase price regardless of the terms and conditions contained in the authorization from the defendant. Of course if the plaintiff had proved, as he pleaded, that the contract procured from Ordway was subsequently accepted and ratified by the defendant there would be no question but that the plaintiff would be entitled to the commission sued for. The evidence, however, fails to show any such acceptance and ratification. True, it does appear in evidence that subsequent to the execution of the original authorization a paper writing was signed by the defendant and delivered to the plaintiff, addressed "To whom it may concern," and purporting to be an offer by the defendant to sell the same land described in the original authorization to plaintiff upon terms which in several particulars were identical with those specified in the contract previously procured by plaintiff from Ordway. This paper writing, however, neither expressly nor by implication purported to affirm or ratify such contract; and furthermore it appears to be an undisputed fact in the case that said paper writing was never finally accepted by the plaintiff either as a ratification of the contract with Ordway, or as a new and independent authorization for the sale of defendant's lands. Upon this point the evidence without conflict is to the effect that said paper writing was returned to the defendant unaccepted because plaintiff was dissatisfied with some of its terms, and upon the understanding that a new agreement upon different terms, authorizing the plaintiff to make a sale of the defendant's property, would be entered into. This new agreement, as the evidence shows without conflict, was never executed.

Under these circumstances it must be held that the evidence does not support the finding that the defendant in writing

accepted and ratified the contract of purchase which the plaintiff procured from Ordway. This being so, plaintiff's case must stand upon the original authorization; and upon that phase of the case the evidence shows without conflict that the plaintiff failed to procure a purchaser who was ready, able, and willing to buy upon the terms and conditions imposed by the defendant. In any view of the case it is clear that the evidence does not support the findings, and therefore the judgment and order appealed from are reversed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1271. First Appellate District.—November 20, 1913.]

HENRY BAKER PARSONS, Appellant, v. W. E. CASHMAN et al., Respondents.

SPECIFIC PERFORMANCE—CONTRACT TO MAKE WILL—CERTAINTY, FAIRNESS, AND CONSIDERATION.—A contract to make a will, in order to be a proper subject for specific performance, must *prima facie* be fair, founded upon an adequate consideration, definite as to the conditions imposed and the obligations assumed, and, if the purported consideration is personal services, the agreement for them must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance.

ID.—PERFORMANCE OF PERSONAL SERVICES—UNCERTAINTY AS TO TIME.—An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued.

ID.—FAIRNESS OF AGREEMENT TO MAKE WILL.—If it appears that such promise to make a will has not induced the promisee to relinquish anything of present or prospective value or advantage, but has operated to his profit rather than his detriment, and the agreement lacks fairness, specific performance will not be decreed.

ID.—CONSIDERATION FOR CONTRACT—OF WHAT TIME TO BE DETERMINED. The sufficiency of a purported or claimed consideration for a contract to make a will must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments.

ID.—CONSIDERATION—BENEFIT TO PROMISOR OR DETRIMENT TO PROMISEE.

A consideration is sufficient to support a contract if there appears to be either a benefit to the promisor or a detriment to the promisee; both alternatives are not necessary.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Frank H. Gould, and Vincent Surr, for Appellant.

J. W. Dorsey, W. E. Cashman, John A. Percy, J. E. White, Lewis F. Byington, Naphtaly & Freidenrich, Jordan, Rowe & Brann, E. J. Talbot, Geo. W. Haight, and Harris & Hess, for Respondents.

LENNON, P. J.—The plaintiff in this action prayed for a decree declaring him to be the owner of and entitled to all of the property of which one Jemima Parsons died possessed, and that the defendants, as devisees and distributees under the will of the decedent, held said property in trust for the plaintiff.

The plaintiffs' cause of action was founded upon a contract alleged to have been entered into between the plaintiff and the deceased, Jemima Parsons, whereby she agreed that at her death she would by will bequeath to plaintiff all of the property of which she might die possessed.

The defendants' demurrer to plaintiff's second amended complaint was sustained upon the ground primarily that the complaint did not state a cause of action. Thereupon judgment was rendered and entered for the defendants, from which plaintiff has appealed upon the judgment-roll.

The demurrer was well taken and rightfully sustained.

With reference to the material matter of the making of the contract in suit the allegations of the second amended complaint are as follows: " . . . Plaintiff is the natural son of a deceased brother of said decedent, and was born in the year 1849 in England; that at the time of the birth of plaintiff said decedent resided in the city and county of San Francisco, state of California; that in the year 1874, when plaintiff was of the age of twenty-four years, he came from England to the said city and county of San Francisco, and there made

himself known to the said decedent; that said decedent thereupon caused investigations to be made to determine the relationship of plaintiff to her, and upon the conclusion of the said investigations, to wit, about three months subsequent to the arrival of plaintiff in California, acknowledged the said plaintiff as the natural son of her brother, William Parsons, and as her nephew; that a short time thereafter, at the urgent request of said decedent, the said decedent and plaintiff entered into an agreement whereby plaintiff agreed to become an inmate of the home of said decedent, to assume the duties and obligations of a son to said decedent, to assist her in all of her business and domestic affairs, as would her own son, and to give to said decedent the affection, support, confidence, and society that a son should give a mother; that at said time the said decedent was a single woman, and thereafter and until her death remained single and unmarried; that in consideration of the said agreement on the part of the plaintiff, hereinbefore set out, the said decedent agreed to perform the part of a mother to the plaintiff, and upon her death to leave to the said plaintiff the property of which she might then be possessed, as though the said plaintiff were in fact the son of the said decedent; that in accordance with the said agreement plaintiff did thereupon enter the household of said decedent, and did perform toward the said decedent all of the conditions of the said agreement, and did, so long as the said decedent remained at liberty to accept the society, affection, support and confidence of the said plaintiff, render the same at all times and without measure, with all the kindness, consideration, respect and devotion that a son of the said decedent could have given, and the said decedent continually thereafter promised and agreed to leave to the said plaintiff her property as hereinbefore set forth upon her death."

The complaint then proceeded to describe in detail numerous and varied acts of kindness and personal attention alleged to have been bestowed by plaintiff upon the deceased during the many years of life which remained to her subsequent to the making of the contract.

It will be seen at a glance that the action is one for relief in the nature of specific performance. Such an action is essentially equitable, and, therefore, the contract under consideration may not be specifically enforced unless it fully conforms

in all of its essentials to the well recognized principles of equity jurisprudence, which, in so far as they are applicable to the cause of action attempted to be here pleaded, are generally and substantially these: 1. The contract *prima facie* must be fair; 2 it must be founded upon an adequate consideration; 3 it must be definite as to the conditions imposed and the obligations assumed; and, 4 if the purported or claimed consideration for the contract be personal services the agreement for such services must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance. (*Owens v. McNally*, 113 Cal. 444, [33 L. R. A. 369, 45 Pac. 710]; *McCabe v. Healey*, 138 Cal. 81, [70 Pac. 1008].)

The contract sought to be enforced in the present case does not conform to all of these requirements. It seems to be the theory of plaintiff, as indicated by the recital in the complaint of many minute matters of personal attention alleged to have been rendered the deceased, that the contract called particularly for the personal services of the plaintiff. Conceding this to be so, and that the terms of the contract indicate with sufficient certainty the nature of the services to be performed thereunder, nevertheless the contract as pleaded is silent as to the length of time for which such services were to be continued and to that extent at least is obviously indefinite in an essential particular. (*Owens v. McNally*, 113 Cal. 444 [33 L. R. A. 369, 45 Pac. 710].)

But aside from this, the contract is not susceptible of specific performance because neither the allegations of the complaint nor the terms of the contract as pleaded disclose a sufficient consideration for its making.

The sufficiency of a purported or claimed consideration for a contract of the character under discussion must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments. Such consideration, before it may be declared sufficient, must disclose not only a benefit conferred or agreed to be conferred upon the promisor, but must reveal as well some prejudice, detriment, or disadvantage suffered or agreed to be suffered by the promisee as an inducement for the promise which forms the basis of the contract. (Civ. Code, sec. 1605.)

In the present case neither the pleaded contract nor the cir-

cumstances alleged to have attended its execution show or tend to show, either expressly or impliedly, that the promise of the deceased operated as an inducement to the plaintiff to relinquish, wholly or partly, anything of present or prospective value or advantage. To the contrary it appears, by implication, at least, that the obligation assumed by the plaintiff as the consideration on his part for the making of the contract, did not require him to abandon any particular position of present or prospective profit. The plaintiff apparently had everything to gain and nothing to lose by acceding to the wishes of the deceased. The alleged circumstances of his meeting with the deceased indicate that it was to his profit rather than his detriment to be provided with all of the comforts of a home in return for the duties and obligations naturally resulting from the assumed relation of a son to the deceased.

Therefore, under all of the circumstances of the transaction, and from the contract itself as pleaded in the plaintiff's complaint, it cannot be fairly said as a matter of equity that the contract in controversy was founded upon a sufficient consideration; and this being so, the promise of the deceased to leave all of her property by will to the plaintiff must be held to be incapable of enforcement in an action for specific performance. (*Baumann v. Kusian*, 164 Cal. 582, [44 L. R. A. (N. S.) 756, 129 Pac. 986].)

The judgment appealed from is affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 19, 1914, and the following opinion then rendered thereon:

THE COURT.—The petition for a rehearing of this case is denied. Under section 1605 of the Civil Code a consideration is sufficient to support a contract if there appears to have been either a benefit to the promisor or a detriment to the promisee. The statement of the opinion of the district court of appeal that both alternatives are necessary is erroneous. The proposition as stated by that court is not necessary to the decision, which is sufficiently supported by the proposition that it is not shown that the contract sought to be enforced was fair.

[Civ. No. 1290. First Appellate District.—November 20, 1913.]

H. N. GARD, Appellant, v. J. L. RAMOS, Respondent.

ACTION FOR GOODS SOLD—AMENDMENT OF ANSWER SO AS TO PLEAD STATUTE OF FRAUDS.—In an action for goods sold and delivered it is not an abuse of discretion for the court to permit the defendant, at the close of the plaintiff's case, to amend his answer so as to affirmatively plead the statute of frauds, where that issue has already been presented by the denials of the answer.

ID.—WAIVER OF STATUTE OF FRAUDS BY FAILURE TO OBJECT TO ORAL EVIDENCE.—In such action the defendant does not waive the issue as to the statute of frauds by his failure to object to oral evidence offered in proof of the agreement to purchase the goods, since such evidence, while not of itself sufficient to establish the agreement, is one of the steps in the order of proof required by the statute of frauds, and is admissible, when followed by the other evidence required by the code, in order to take the agreement out of the statute.

ID.—STATUTE OF FRAUDS—ORAL SALE OF GOODS—RECEIPT AND ACCEPTANCE.—It is essential, in order to take an oral agreement for the sale of personal property of the value of over two hundred dollars out of the statute of frauds, that the buyer should both receive and accept the goods. The requirement of section 1739 of the Civil Code in this respect is not affected by the amendments to section 1624 of the Civil Code or section 1973 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. John Ellsworth, Judge.

The facts are stated in the opinion of the court.

F. I. Lemos, and Snook & Church, for Appellant.

Henry G. W. Dinkelspiel, and John R. Jones, for Respondent.

RICHARDS, J.—This is an action brought to recover the sum of \$461.30, the value of certain goods, wares, and merchandise claimed to have been sold and delivered by plaintiff's assignor to the defendant and which he refused to accept and pay for. The answer denied the contract to purchase the

goods and also their delivery, and admitted the defendant's refusal to receive and pay for them.

Upon the trial the plaintiff offered evidence of an oral agreement to purchase the goods, which evidence was admitted without objection on the part of the defendant. The plaintiff also offered proof of the delivery of the goods to the Southern Pacific Railway Company, a common carrier, at San Francisco, for shipment to the defendant at Haywards, California, and that they were duly forwarded to him there, but that he refused to accept or receive or pay for them.

At the close of plaintiff's case the defendant moved the court for leave to amend his answer so as to set up the plea of the statute of frauds. The court granted this motion. Thereupon the defendant moved for a nonsuit, which motion the court also granted, and entered judgment accordingly. From these orders and judgment, and also from an order denying plaintiff's motion for a new trial, he prosecutes this appeal.

The first point presented by appellant is that the court erred in permitting the defendant to amend his answer at the close of plaintiff's case so as to plead affirmatively the statute of frauds. We think this point is not well taken for two reasons: 1. That the large discretion with which the trial court is invested in the matter of permitting the amendment of pleadings should not be disturbed upon appeal except where it clearly appears that such discretion has been abused—which does not appear in this case; and, 2. that the error, even conceding its existence, would have been harmless, for the reason that the issue of the statute of frauds had already been presented by the denials of the defendant's answer. (*Feeney v. Howard*, 79 Cal. 525, [12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984].)

Counsel for appellant, however, contends that during the trial the defendant waived the issue as to the statute of frauds by his failure to object to the oral evidence offered in proof of the agreement to purchase the goods at the time of the offer of such evidence. This contention cannot be sustained, for the reason that the oral evidence offered in proof of the agreement in question, while not of itself sufficient to establish it, was one of the steps in the order of proof required by the statute of frauds, and was still admissible, when followed by the other evidence required by the code, in order to take the

agreement out of the statute. (*Wilson v. Hotchkiss*, 21 Cal. App. 392, [132 Pac. 88]; *Marsh v. Hyde*, 3 Gray (69 Mass.), 331.)

The main question presented by the record is as to the correctness of the court's ruling in granting a nonsuit. The place of business of the assignor of plaintiff was San Francisco. The defendant resided and had his place of business at Haywards. The goods in question were duly delivered to the carrier for shipment, and were duly transported from the former to the latter place. The appellant contends that this delivery to the carrier constituted a delivery to and receipt by the buyer; that the words deliver and receive are synonymous, and hence that said delivery to the carrier constituted such a receipt of the goods by the buyer as would take the case out of the statute of frauds. Counsel for the appellant cites many cases from other states supporting his contention that the words deliver and receive are identical in meaning when used in connection with the statute of frauds. Our view of the construction to be placed upon the several sections of the code referring to the statute of frauds renders it unnecessary to decide this question, for the reason that it is essential, in order to take an oral agreement for the sale of personal property of the value of the goods in question here out of the statute of frauds, that the buyer should both *receive* and *accept* the goods. The confusion which was created in our codes by the amendment to section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure, changing the phrase "receive and accept" to "receive or accept" in each of these sections, while leaving section 1739 of the Civil Code unchanged in this respect, was brought to the attention of this court in *Booth v. Levy etc. Co.*, 21 Cal. App. 427, [131 Pac. 1062]. That was a case in its main facts identical with the present one; and it was there held that section 1739 of the Civil Code is the section which sets forth the substantive law governing sales of personal property and laying down the requisites of a valid contract as to such sales; and that this being so, the express requirement of said section that, in order to validate an oral agreement for the sale of personal property of a value in excess of two hundred dollars, the buyer must both "receive *and* accept" the goods, is not to be held repealed by implication, or affected by the changes wrought

in section 1624 of the Civil Code or section 1973 of the Code of Civil Procedure, by the more recent amendments thereof.

Adhering to these views as in accord with the construction which has been consistently placed upon section 1739 of the Civil Code in earlier cases (*Jamison v. Simon*, 68 Cal. 17, [8 Pac. 502]; *Terney v. Doten*, 70 Cal. 399, [11 Pac. 743]; *Daughiny v. Red Poll Creamery Co.*, 123 Cal. 548, [56 Pac. 451]), we are constrained to hold that the plaintiff in this case, having failed to show a receipt *and* acceptance of the goods by the buyer, the motion for a nonsuit was properly granted and the motion for a new trial properly denied.

Judgment and order affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 471. First Appellate District.—November 20, 1913.]

THE PEOPLE, Respondent, v. GEZA HORVATH, Appellant.

CRIMINAL LAW—INFORMATION—WAIVER OF OBJECTIONS IN ABSENCE OF DEMURDER.—An objection to an information that it does not substantially conform to the requirements of sections 950 and 952 of the Penal Code, will be regarded as waived in the absence of a demurrer.

ID.—RAPE—INFORMATION IN LANGUAGE OF STATUTE.—An information for rape, drawn in substantial compliance with section 261 of the Penal Code, is sufficient.

ID.—SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT OF GUILTY.—In this prosecution for rape the evidence is sufficient to support the verdict of guilty.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—ASSIGNMENT OF ERROR—REVIEW ON APPEAL.—Asserted error of the trial court in failing to instruct the jury to disregard certain alleged prejudicial remarks of the district attorney during the argument of the case will not be considered on appeal where the record fails to show what such remarks were, or that any objection was made to them at the time, or that any request for an instruction to the jury to disregard them was ever made.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Wm. P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Frank Schilling, for Appellant.

U. S. Webb, Attorney-General, C. M. Fickert, District Attorney, and Edward A. Cunha, Assistant District Attorney, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of the defendant of the crime of rape.

Appellant contends that the information is insufficient in the several particulars set forth in the briefs of his counsel upon this appeal. No demurrer was presented to the information, and the first objection to either its form or substance was that contained in appellant's application under section 1247 of the Penal Code for a transcription of the record; wherein the appellant, in stating the grounds of his appeal, asserts:

1. That the information does not substantially conform to the requirements of sections 950 and 952 of the Penal Code; and,
2. That the facts stated in said information do not constitute a public offense.

In the absence of a demurrer the first of these objections must be held to have been waived (Pen. Code, sec. 1012); and as to the second objection, we find it to be without merit. The information is drawn in substantial compliance with section 261 of the Penal Code, which has always been held sufficient in this state. (*People v. Burke*, 34 Cal. 661; *People v. Rango*, 112 Cal. 669, [44 Pac. 1071].)

The next objection of the appellant is that the evidence is not sufficient to support the verdict of the jury. We are convinced from an examination of the reporter's transcript of the evidence that this contention is also devoid of merit, and that the defendant was properly convicted upon the evidence presented to the jury, unless we shall find that the court committed some prejudicial error of law during the course of the trial.

As to the alleged errors of law in ruling upon the admission of evidence and in the instructions, which are specified in the appellant's brief, we find that they are all trivial and in the main not sustained by the state of the record; and as to the asserted error of the court in failing to instruct the jury to disregard certain alleged prejudicial remarks of the district attorney during the argument of the case, the record utterly

fails to show what such remarks were, or that any objection was made to them at the time, or that any request for an instruction to the jury to disregard them was ever made.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1377. Second Appellate District.—November 20, 1913.]

W. H. TAYLOR, Respondent, v. SIMI CONSTRUCTION COMPANY (a Corporation), Appellant.

CONTRACT—PROMISE TO PAY MONEY—EXECUTED CONSIDERATION—ABANDONMENT OF WORK.—Where a construction company promises, for value received, to pay a certain sum of money upon the completion of a water-plant and pipe-line which it has agreed to construct, it cannot, by abandonment of work on the water-plant, escape liability on its promise to pay the money.

'APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Chase, Overton & Lyman, and P. B. Plumb, for Appellant.

Chas. T. Howland, and Bernard Potter, for Respondent.

JAMES, J.—A demurrer assigning the general ground that sufficient facts were not stated to constitute a cause of action, was interposed to plaintiff's complaint and overruled by the trial court. Defendant failing to answer within the time allowed by the court, judgment was entered in accordance with the prayer of the complaint. This appeal, from that judgment, followed.

The contract upon which the action was brought, and which was set out in the complaint, was as follows:

"Los Angeles, Cal., December 26, 1911.

"For value received, Simi Construction Company promises to pay to John W. Sharpe the sum of one thousand dol-

lars, without interest, at its office in Los Angeles, California; said payment to be made within three days after water is turned on the first twenty-five or more acres of land subscribed by stockholders of the Moorpark Irrigation Company, other than the Simi Construction Company, itself.

“(Seal)

SIMI CONSTRUCTION COMPANY,
“By R. S. Masson, President;
“Leta Masson, Secretary.”

It will be noted that the contract was upon a consideration executed, the only uncertain condition being as to the date of its maturity. Not being complete in its statement of the conditions upon the performance of which the money would become due, plaintiff set out in his complaint other facts as follows:

“III.

“That at the time of the execution and delivery of the said note the said Simi Construction Company had agreed and was proposing to construct a water-plant and a pipe-line and to pipe water and deliver the same to certain farmers in the vicinity of Moorpark, under an arrangement or association to be known as the Moorpark Irrigation Company, and it was proposed and understood that the said water-plant and pipe-line should be completed and water turned therein within three months from the date of the execution of the said note, and plaintiff further alleges that three months was a reasonable and ample time for the construction and equipment of said pipe-line and for the turning of the water on the first land subscribed by the stockholders of said Moorpark Irrigation Company.

“IV.

“That the defendant has not constructed the said pipe-line, nor has it made any effort or attempt so to do, but that the defendant has abandoned the construction and delivery of water to the subscribers, as hereinbefore mentioned.”

For the purposes of a consideration of the ruling on the demurrer, the allegations in paragraph III may be disregarded wholly, in so far as they refer to the matter of what constituted a reasonable time for the construction of the water-plant and the turning of the water on the land referred to in the contract. It sufficiently appears by appropriate

allegations that defendant had agreed to construct a water-plant and pipe-line and that this plan prior to the commencement of this action had been abandoned. If the defendant by abandoning its plan to construct the water-plant could postpone the date of the maturity of the debt evidenced by the writing, then the plaintiff, having parted with the consideration for which reimbursement was agreed to be made, could never enforce payment under the contract. It seems quite plain that no such contingency was contemplated by the parties. The defendant having agreed to make payment within a stated time after the happening of an event, could not by refusing to permit that event to occur escape liability upon its contract.

The complaint appears very clearly to state facts sufficient to constitute a cause of action, and hence the demurrer was properly overruled.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1426. Second Appellate District.—November 20, 1913.]

C. W. FISHER et al., Appellants, v. ANNA MAE FISHER,
Respondent.

DEEDS—PLEADING NONDELIVERY IN ACTION TO ESTABLISH TRUST IN LAND—LEGAL CONCLUSIONS.—A complaint in an action to establish that a grantee holds the land in trust on the theory that there has been no delivery of the deed, which alleges that there has been "no valid delivery" of the deed, that the grantor "never intended to convey said property except upon the conditions hereinbefore stated," and that the defendant, with intent to defraud the plaintiffs, "obtained possession thereof without right," is insufficient as against demurrer. The use of the words "valid," "without right," "unlawfully," etc., are allegations of legal conclusions.

ID.—INSUFFICIENT ALLEGATION OF NONDELIVERY—PRESUMPTION OF DELIVERY.—If the complaint in such action fails sufficiently to allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against the pleader, that there was some sort of a delivery of the instrument, qualified or otherwise.

ID.—CONDITIONAL DELIVERY OF DEED—WHETHER BECOMES ABSOLUTE.—

Where the grantor delivers a deed to his grantee with the intent that it shall convey title only in the event that the grantor shall not survive a contemplated surgical operation, the delivery is governed by the provisions of section 1056 of the Civil Code and becomes absolute and final.

ID.—DEEDS IN HANDS OF GRANTEE—PRESUMPTION OF DELIVERY—PLEADING NONDELIVERY.—

There is a presumption that a deed found in the hands of the grantee was rightfully delivered; and in an action to establish a trust in the land on the theory of nondelivery of the deed, an express allegation of nondelivery, or of facts as to the obtaining of the possession of the deed by the grantee which show in themselves that there could have been no delivery, is necessary to the statement of a good cause of action.

APPEAL from a judgment of the Superior Court of Los Angeles County. Eugene P. McDaniel, Judge presiding.

The facts are stated in the opinion of the court.

Murphey & Poplin, for Appellants.

Drew Pruitt, and L. D. Collings, for Respondent.

JAMES, J.—One W. J. Fisher, now deceased, was the brother of all of the parties who appear as plaintiffs in this action. Anna Mae Fisher, the defendant, was his wife. In the complaint it is alleged that on the seventh day of September, 1903, the decedent was the owner in fee of certain real property, and that being about to have an operation performed upon his person of a serious nature which might result in his death, he "made and executed deeds of conveyance of various properties owned by him to various persons, said deeds to be delivered to the grantees therein named in the event of the death of said Fisher as a result of said contemplated operation." It is then alleged that among the conveyances so made was one wherein the said Fisher "signed and acknowledged a certain deed of conveyance, conveying to his then wife, Anna Mae Fisher, the following described property": (Here follows a description of a certain tract of ground situated in the county of Los Angeles.) Further allegations of the complaint set out that the said Fisher recovered from the effects of the operation and that he did not die until several years there-

after, to wit: on the fourth day of June, 1911. It is also alleged that after recovering from the effects of the operation, he continuously up to the time of his death remained in possession of the real estate mentioned in the deed made to his wife, claimed the same as his own separate estate, and exercised acts of dominion over it. Plaintiffs then allege that three days after the death of said Fisher his wife caused the deed "so executed by decedent on the 7th day of September, 1903," to be recorded in the office of the county recorder, and that she since said date has claimed to own and be in possession of the premises described in the deed. This allegation then follows: "That there never has been a valid delivery of said deed of conveyance from said W. J. Fisher to said defendant, Anna Mae Fisher, and the said W. J. Fisher never intended to convey said property in said deed described to said defendant, except and upon the conditions hereinbefore stated in paragraphs III and III½ hereof; and the plaintiffs are informed and believe, and upon such information and belief allege, that said defendant fraudulently and unlawfully and with intent to deceive and defraud the plaintiffs and each of them of their just rights or proportions in the property described in said deed, obtained possession thereof without right; and plaintiffs allege that whatever record title may appear to be vested in said defendant by reason of said purported conveyance, is held in trust by said defendant as constructive trustee for all the heirs of said W. J. Fisher, deceased." In a second count are further allegations purporting to state a cause of action to set aside a judgment obtained by defendant against the administrator of the estate of W. J. Fisher, by which judgment the title of the defendant to the real estate described in the aforesaid deed was quieted. The prayer was for a decree determining that the judgment referred to in the second cause of action had been fraudulently obtained, and that the defendant be decreed to hold the real property described in the deed referred to in the first count as the trustee for the plaintiffs and defendant as heirs at law of decedent. A demurrer was interposed to the complaint on the part of defendant by which several grounds of objection were stated. The demurrer was sustained and plaintiffs declining to amend their complaint, judgment of dismissal followed. This appeal was then taken.

The general ground of objection stated in the demurrer, to wit: that the complaint in either court failed to state facts sufficient to constitute a cause of action, will be the only one necessary to be considered. In paragraph VII of the complaint, which has been quoted fully in the foregoing, the plaintiffs first allege that there had been no "valid delivery" of the deed of conveyance; second, "that the said W. J. Fisher never intended to convey said property . . . except upon the conditions hereinbefore stated"; and, third, "that said defendant, with intent to deceive and defraud the plaintiffs and each of them of their just rights or proportions in the property described in said deed, obtained possession thereof without right." Plaintiffs have not by these allegations sufficiently stated the fact, if it was a fact, that there was no delivery of the deed by W. J. Fisher to his wife. To say that there was no "valid delivery" was not an allegation of nondelivery, and to say that the defendant obtained possession of the deed "without right" did not sufficiently show that her possession was not such as resulted from an actual delivery to her of the deed. The use of the words "valid," "without right," "unlawfully," etc., were allegations of legal conclusions on the part of the pleader and were similar to words and phrases so denominated in the decision of the case of *Callahan v. Broderick*, 124 Cal. 80, [56 Pac. 782], where the supreme court said: "The necessity for a statement of the facts essential to a right claimed is not obviated by averments of legal conclusions (*Aurrecoechea v. Sinclair*, 60 Cal. 532); for allegations of conclusions of law will be disregarded in considering objections raised by demurrer. (*Ohm v. San Francisco*, 92 Cal. 437, [28 Pac. 580].) A conclusion of law tenders no issue, and a complaint which depends upon such allegations is insufficient and demurrable." Nor is the cause of action saved to plaintiffs by the allegations that "said W. J. Fisher never intended to convey said property in said deed described to said defendant, except and upon the conditions hereinbefore stated in paragraphs III and III½ hereof" (the paragraphs referred to being those which set out the facts concerning the making of the deeds immediately prior to the time the operation was performed upon the said Fisher). If the complaint fails to sufficiently allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against

the pleader, as is the rule, that there was some sort of a delivery of the instrument, qualified or otherwise. Section 1056 of the Civil Code provides as follows; "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made." So that, if Fisher did deliver the deed to his grantee with the intent that it should convey title only upon the event that he should not survive the operation, the delivery under such condition was governed by the provisions of the section of the Civil Code cited and became absolute and final. It is not alleged that at the time decedent made the deeds in 1903 he retained them in his possession, or that he did not then deliver them, and it is not alleged as to when the defendant became possessed of the deed which he afterward recorded. There is a presumption that a deed found in the hands of the grantee was rightfully delivered, and in an action of this kind an express allegation of nondelivery is necessary to the statement of a good cause of action; or facts must be alleged touching the obtaining of the possession of the deed by the grantee which show in themselves that there could have been no delivery of the deed. As to the second count of the complaint: That count rested for its support upon the main allegations contained in the first count, which were referred to and made a part of the second alleged cause of action. If the first count stated no cause of action, then it must follow that the second count was defective in its statement of sufficient facts to warrant a recovery. For the reasons given, it appears that the demurrer was properly sustained.

The judgment is affirmed.

Conrey, P. J. and Shaw, J., concurred.

[Civ. No. 1395. First Appellate District.—November 21, 1913.]

BERKELEY BANK OF SAVINGS AND TRUST COMPANY, Respondent, v. WILLIAM MILLER et al. Appellants.

MORTGAGE—ACTION TO FORECLOSE—STIPULATION AS TO DISPOSITION OF SURPLUS—CONCLUSIVENESS ON APPEAL.—Where all the defendants in an action to foreclose a mortgage stipulate that all claims (except those of defendants who afterward appeal) to any surplus that may remain after the satisfaction of the mortgage need not be disposed of in the present action but should await adjudication in another action pending between the several defendants to determine the extent and priorities of their respective claims to the mortgaged premises, the appealing defendants cannot complain of a provision in the decree of foreclosure requiring the surplus to be deposited with the court to await judgment in the other action pending, nor can they complain of the failure of the lower court to adjudicate the issues presented by the answers of the nonappealing defendants. This is so because of the principle of appellate procedure which denies to a party in a civil action the assertion of a right which he has formally waived, or the advantage of an error in which he has knowingly acquiesced.

ID.—ATTORNEY FEE—POWER OF COURT TO FIND AS TO REASONABLENESS. In an action to foreclose a mortgage the court has the right to determine, even if no evidence has been adduced on the subject, that the attorney fee provided in the mortgage is reasonable.

ID.—FORECLOSURE OF MORTGAGE—SUBROGATION TO RIGHTS OF PLAINTIFF—SUBSTITUTION OF PARTIES.—Where one of the defendants in foreclosure proceedings, who claims an interest in the premises subordinate to the mortgage, makes a tender to the plaintiff for the amount due him, together with the costs and counsel fees, which tender is accepted, he is entitled to be subrogated to the interests of the plaintiff, and then properly substituted as the plaintiff in the action.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. J. D. Murphey, Judge presiding.

The facts are stated in the opinion of the court.

Welles Whitmore, and Thomas C. Huxley, for Appellants.

J. A. Elston, Daniel O'Connell, R. V. Whiting, and Howard J. Piersol, for Respondent.

LENNON, P. J.—This is an appeal by the defendants, Herman Murphy, Ella M. Murphy, and the Progressive Investment Company, from a judgment and order denying a new trial in an action wherein a decree was made and entered, foreclosing a real property mortgage executed by the defendant Herman Murphy to the corporation plaintiff, as security for the payment of a promissory note in the sum of six thousand five hundred dollars. All of the other defendants were made parties to the action because, as alleged in the complaint, they had or claimed to have some interest in the mortgaged premises which was subsequent and subordinate to the lien of the mortgage.

The execution and nonpayment of the note and mortgage were admitted by the answers of each and all of the defendants. The defendants William Miller, G. A. Murphy, George C. Richards, and the Black-White Company, by their answers admitted that whatever interest they had in the mortgaged premises arose subsequent to the execution of the mortgage out of attachments or judgment liens in other actions which they had instituted against the defendant Herman Murphy.

When the case was called for trial each and all of the defendants stipulated in open court that any and all claims other than those of the appealing defendants to the surplus, if any, that might remain after the satisfaction of the mortgage need not be determined and disposed of in the present action, and that such claims should await and be subject to adjudication in another action instituted and then pending between the several defendants for the purpose of determining the extent and priorities of their respective claims and liens against the mortgaged premises. Accordingly the lower court proceeded to a hearing of the action only upon the issues raised by the joint answer of the appealing defendants; but in its findings and decree of foreclosure provided that the surplus, if any, remaining from the sale of the mortgaged premises should be deposited with the court to await judgment in the other action pending.

The question of the sufficiency of the findings and judgment in so far as they affect the rights of the nonappealing defendants is not before us upon this appeal; and obviously such question cannot concern the appealing defendants. The judgment as a whole is not inherently void; and assuming,

without so deciding, that the rights of the nonappealing defendants could have been considered and disposed of in the present action if the appealing defendants had so insisted, the failure to do so was the fault of all of the parties to the action rather than the mistake of the court. The judgment in respect of its provision requiring the impounding of any surplus which might remain from the proceeds of the foreclosure sale after satisfaction of the note and mortgage, etc., was made and entered by and with the consent of all of the parties to the action; and therefore the appealing defendants are in no position to complain of that feature of the judgment, or of the failure of the lower court to find upon and adjudicate the issues presented by the answers of the nonappealing defendants. This is so because of the well-settled principle of appellate procedure which denies to a party in a civil action the assertion of a right which he has formally waived, or the advantage of an error in which he has knowingly acquiesced. (*Holmes v. Rogers*, 13 Cal. 191; *Spinetti v. Brignardello*, 53 Cal. 281; *Thompson v. Connolly*, 43 Cal. 636; *Crosby v. North Bonanza*, 23 Nev. 70, [42 Pac. 583]; *Erlanger v. Southern Pacific Co.*, 109 Cal. 395, [42 Pac. 31].)

The attorney fee allowed for foreclosure was within the limits of the same provided in the mortgage. The trial court found such sum was reasonable, and this it had the right to do even if no evidence had been adduced on the subject. (*Alden v. Pryal et al.*, 60 Cal. 215; *O'Neal v. Hart*, 116 Cal. 69, [47 Pac. 926]; *Edwards v. Grand*, 121 Cal. 254, [53 Pac. 796]; *Hotaling v. Monteith*, 128 Cal. 556, [61 Pac. 95]; *Bonestell v. Bowie*, 128 Cal. 511, [61 Pac. 78].)

During the pendency of the action the defendant Miller tendered to the corporation plaintiff the sum due for principal and interest upon the note and mortgage in suit, together with a sum sufficient to cover the accrued costs and the attorney's foreclosure fee provided for in the mortgage. Such tender and its acceptance were subsequently shown to the lower court upon the hearing of a motion by the defendant Miller to be subrogated to the interests of the plaintiff; and upon the showing made the defendant Miller was rightfully subrogated to the interests of the corporation

plaintiff, and then properly substituted as the plaintiff in the action. (Code Civ. Proc., sec. 385.)

Upon examination we find the remaining points presented in support of the appeal do not warrant discussion, much less a reversal.

The judgment and order appealed from are affirmed.

Kerrigan, J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 20, 1914.

[Civ. No. 1277. First Appellate District.—November 21, 1913.]

UNION COLLECTION COMPANY (a Corporation),
Respondent, v. DEW R. OLIVER, Appellant.

APPEAL—TIME FOR FILING TRANSCRIPT—PENDENCY OF PROCEEDING—

RULE OF SUPREME COURT.—A proceeding is pending for the settlement of a bill of exceptions, within the meaning of rule II of the supreme court relating to the time of filing the transcript on appeal from a judgment, where an appeal has been taken from an order relieving a party moving for a new trial from his omission to serve his notice of intention within the time prescribed by law, regardless of the ultimate success or failure of the proceeding.

CORPORATIONS—SALE OF STOCK—GUARANTY TO REFUND MONEY IN CASE

OF DISSATISFACTION.—Where a guaranty is made to the purchaser of corporate stock to refund to him all moneys paid "in twelve months from date, in the event that you are not satisfied with your investment," an expression of dissatisfaction and a demand for the fulfillment of the guaranty may be made at any time during the life of the agreement, and are not premature if made before the last day of the life of the guaranty.

ID.—ASSIGNMENT OF GUARANTY—VALIDITY AND EFFECT.—An assignment

of the guaranty by the obligee, prior to the last day fixed in the demand for refunding the money, is valid; it operates to authorize the assignee to collect the same when it becomes due and payable.

ID.—ASSIGNABILITY OF GUARANTY—RATIFICATION OF ASSIGNMENT.—

Such a guaranty is assignable, and if it were not, its assignment could be ratified by the guarantor, with notice of the assignment,

agreeing with the assignee to pay an amount agreed to be due under the contract.

ID.—CONTRACT—WHETHER THAT OF CORPORATION OR OF ITS PRESIDENT.

The fact that the guarantor in signing the contract adds the word "President" after his signature does not make the contract the obligation of the corporation of which he is president, nor does the use of the letterhead of the corporation carry any such presumption.

ID.—RETURN OF STOCK ON PAYMENT OF MONEY—JUDGMENT—APPEAL.—

The failure to provide in the judgment, in an action on the guaranty for the return of the money, that the stock must be returned on payment of the judgment, cannot be objected to on appeal, where the complaint in the action contemplates that upon payment the stock shall be returned to the defendant, and he, neither in his answer nor in any other way, indicated that he was not satisfied to let the case go to trial and judgment resting on that assumption.

ID.—PLEADING—COMPLAINT EMBRACING TWO COUNTS—ONE COUNT DEFECTIVE.—

Where a complaint embraces two counts, one of which states sufficient facts to constitute a cause of action, it is good as against a general demurrer, and an appellate court will not reverse a judgment for the plaintiff, even if the other count is defective; for the sake of upholding it, the judgment will be presumed to be based upon the count against which there is no valid objection.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Frank H. Gould, and Vincent Surr, for Appellant.

J. S. Reid, Charles W. Willard, and Rufus H. Kimball, for Respondent.

KERRIGAN, J.—This is an appeal from the judgment in an action based on a written contract.

Preliminarily plaintiff insists that the transcript was not filed within the time prescribed by law, and that therefore there is no bill of exceptions or statement of the case that can be considered on this appeal.

Through an inadvertence the defendant failed to serve his notice of intention to move for a new trial (according to the claim of plaintiff) within the time limited therefor. Thereafter the trial court, upon notice and motion, made an order relieving the defendant from the consequences of his omis-

sion. From that order the plaintiff took an appeal to the supreme court, and that court reversed the same, holding that a motion for a new trial was collateral to the original action and in the nature of a new and independent proceeding to which the provisions of section 473 of the Code of Civil Procedure, were inapplicable (*Union Collection Co. v. Oliver*, 162 Cal. 755, [124 Pac. 435].) Long prior to the reversal of said order and within sixty days after the judgment was made and entered, defendant served and filed notice of appeal therefrom, and on the same day also served his proposed bill of exceptions. Subsequently the plaintiff, reserving its objections to the bill, proposed amendments thereto, and the bill was in course of settlement in April, 1906, when it was destroyed by the great fire which occurred in San Francisco on the eighteenth day of that month. The shorthand notes of the evidence and proceedings, however, were not destroyed, and they were subsequently again transcribed, and ultimately the bill of exceptions was settled and allowed. Defendant did not file the transcript on appeal from the judgment sooner, depending upon rule II of the supreme court, [160 Cal. xlii, 119 Pac. ix], which in part provides "When a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time aforesaid (i. e., for filing transcript) shall not begin to run until the motion for a new trial has been decided or the proceeding therefor dismissed." And the question presented is, Was there under the rule a proceeding pending for the settlement of a bill of exceptions?

There can be no doubt that there was. Whether or not such a proceeding was pending does not depend upon its ultimate success or failure (*Dernham v. Bagley*, 151 Cal. 216, [90 Pac. 543]; *Curtin v. Ingle*, 155 Cal. 56, [99 Pac. 480]; *White v. White*, 112 Cal. 580, [44 Pac. 1026].) The transcript on the appeal from the judgment was filed pending the decision of the motion for a new trial; and the fact that the motion was ultimately dismissed does not preclude the use of the bill of exceptions on the appeal from the judgment. (*Foley v. Foley*, 120 Cal. 37, [65 Am. St. Rep. 147, 52 Pac. 122]; *Kelly v. Ning Yung etc. Assoc.*, 138 Cal. 603, [72 Pac. 148].)

We pass now to a consideration of the appeal. The complaint is in two counts, and is based upon the following written instrument:

“San Francisco, Cal., July 3, 1902.

“MR. H. J. MILLER, City.

“Dear Sir: I hereby guarantee to refund all moneys paid by you for the purchase of Zubiata stock in twelve months from date, in the event that you are not satisfied with your investment.

“DEW R. OLIVER, President.

“Witness: J. R. KENNY.”

The life of this guarantee was extended by the maker in writing until June 22, 1904. A few days prior to that time the following writing, dated June 3, 1904, was delivered to the defendant:

“MR. DEW R. OLIVER, San Francisco.

“I hereby notify you that I am not satisfied with my investment in Zubiata mining stock referred to in your letter dated July 3d, 1902, and I hereby exercise my right to demand that you comply with your guarantee of said date and that you pay to me not later than the 22d day of June, 1904, the sum of \$3,000.00, the same being the amount of my investment in said stock, including assessment on same. At the time of the payment of said sum, I shall indorse and transfer the whole of said stock to you or to any person you may name.

“H. J. MILLER.”

On June 21st, 1904, Miller assigned and transferred all his right, title, and interest under the contract and the indebtedness owing thereunder to the plaintiff.

Plaintiff also alleges that on the twenty-second day of June, 1904, an account was stated between plaintiff and defendant upon the aforesaid indebtedness, and upon such statement a balance of three thousand dollars was found to be due from the defendant to plaintiff, and that the defendant then and there promised to pay the same.

This action was commenced in July following. It was tried by a jury, which rendered a verdict against the defendant for the sum of \$2,655, with interest, and judgment was rendered pursuant to the verdict.

Defendant insists that the allegations of the complaint "preclude a cause of action." This contention is founded on a number of grounds. Answering the first of these, the defendant had a right to express his dissatisfaction, and make his demand for the fulfillment of the guarantee, at any time during the life of the contract (*Herberger v. Husman*, 90 Cal. 583, [27 Pac. 428]); and under a fair interpretation of the words of the contract "I . . . guarantee to refund . . . in twelve months from date" the defendant had until the expiration of that period, or any extension thereof, in which to comply with Miller's demand, which would give him until June 22d, 1904. The very language of the contract giving the defendant the whole of the period of the guaranty in which to make it good was equally effective in conferring upon Miller the right to make his demand at any time within that period; and we cannot agree with the contention of the defendant that Miller's demand was prematurely made, and therefore abortive, because made before the last day of the life of the guaranty.

The fact that the assignment by Miller to the plaintiff was made before the money was due is also immaterial. It operated to authorize the assignee to collect the same when it should become due and payable. Assignments of future interests are valid. (2 Am. & Eng. Ency. of Law, p. 1027; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 567, [86 Pac. 820]; *La Rue v. Groezinger*, 84 Cal. 281, 283, [18 Am. St. Rep. 179, 24 Pac. 42]; *Field v. Mayor of New York*, 6 N. Y. 179; [57 Am. Dec. 435]; *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 338, [109 Pac. 499].)

Nor is there any merit in the argument of defendant that the contract was personal, and therefore unassignable. The contract does not provide that it shall not be assigned. Neither is it in its nature strictly personal, and therefore unassignable (2 Am. & Eng. Ency., pp. 1010, 1018; 4 Cyc. 22; *Taylor v. Black Diamond*, 86 Cal. 589, [25 Pac. 51].)

Even if the contract were not assignable, its transfer could be ratified (*Sharp v. Edgar*, 3 Sandf. (N. Y.) 381; 2 Am. & Eng. Ency. of Law, 1028); and this, according to the allegations of the first count of the complaint, was done; for it is there stated that the defendant, having notice of the assignment, agreed with the plaintiff on the 22d day of June,

1904, that the amount due under the contract was three thousand dollars, and agreed to pay to plaintiff that sum. This upon demurrer must be taken as true, and to establish a ratification of the assignment.

This disposes of the points made against the complaint. We may add, moreover, that as the complaint embraces two counts, one of which without any doubt states sufficient facts to constitute a cause of action, it is good as against a general demurrer, and we could not reverse the judgment even if the other count were defective (*Bernstein v. Downs*, 112 Cal. 204, [44 Pac. 557]; *Terrill v. Terrill*, 109 Cal. 413, [43 Pac. 137]). For the sake of upholding it, the judgment will be presumed to be based upon the count against which there is no valid objection. (*Nielson v. Provident Sav. etc. Society*, 139 Cal. 339, [96 Am. St. Rep. 146, 73 Pac. 168].)

Defendant strenuously insists that he acted throughout the transaction only in the capacity of an officer of the Zubiata Mining Company, and that therefore the action did not lie against him.

The execution of the contract by the defendant by signing his name and adding thereafter the word "president" did not make the contract the obligation of the corporation. (*Bank v. Wallis*, 150 N. Y. 455, [44 N. E. 1038]; *Gerding v. Funk*, 48 App. Div. 603, [64 N. Y. Supp. 423, 426]; *Hall v. Jameson*, 151 Cal. 610, [121 Am. St. Rep. 137, 12 L. R. A. (N. S.) 1190, 91 Pac. 518].) Nor does the fact that the defendant used the letterhead of the corporation carry any presumption that the contract was made by the corporation. (*Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, [108 Pac. 621, 28 L. R. A. (N. S.) 1107]; *Casco Nat. Bank v. Clark*, 139 N. Y. 312, [36 Am. St. Rep. 705, 34 N. E. 908].) The contract is in the first person singular, meaning the defendant; and in the three extensions of time the defendant signed his name without the addition of the word "president." Besides this, in settling the account with the plaintiff the defendant showed that he regarded the contract as his individual obligation. These circumstances, together with the evidence of Miller that the defendant gave him the contract as his personal guarantee, must be regarded as sufficient to support the verdict of the jury upon this point.

There is no merit in defendant's assertion that the judgment, in failing to provide that the stock must be returned upon payment of the judgment, has left one of the issues of the case undecided. There was no such issue in the case. When the demand was made upon the defendant for the amount claimed to be due under the guaranty a tender of the stock was made. Defendant refused to comply with the demand, and repudiated the whole transaction, whereupon Miller or his assignee became vested with a cause of action against Miller for the amount due. The complaint makes no reference to what shall be done with the stock, but contemplates that upon payment of the amount due under the contract the stock shall be delivered to the defendant, and that in the mean time the plaintiff shall be the bailee thereof. The defendant, neither in his answer nor in any other way indicated that he was not satisfied to let the case go to trial and judgment resting on that assumption; and he cannot now be heard to complain.

It is perfectly apparent that there was a consideration for the making of the contract, and that the evidence sustains the verdict of the jury that there was an account stated.

Other points have not been overlooked, but on examination they have been found to be without merit.

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 20, 1914.

[Civ. No. 1162. Third Appellate District.—November 22, 1913.]

E. BOSCHETTI et al., Respondents, v. THOMAS J. MORTON et al., Appellants; P. L. BADT, Intervener and Appellant.

GUARANTY OF LEASE—ACTION TO ENFORCE—LESSEE NOT NECESSARY PARTY.—In an action by the lessor on a guaranty of a lease, the lessee, who is insolvent, is not a necessary party defendant.

ID.—PLEADING—REDUNDANT MATTER IN COMPLAINT—REFUSAL TO STRIKE OUT.—In such action the refusal of the court to strike out redundant matter in the complaint setting forth proceedings to recover rent in the justice's court, is not ground for a reversal of the judgment, it not appearing that defendants were in any wise prejudiced by the redundancy.

ID.—AMENDED ANSWER ALLEGING PENDENCY OF ANOTHER ACTION—REFUSAL OF LEAVE TO FILE.—It is not error in such action to refuse leave to file an amended answer, setting forth by way of plea of abatement the pendency of another action between the lessee and the plaintiffs here to recover damages for the defective construction of the building and the consequent injury to goods, where the guarantor is not a party to such action.

ID.—EXECUTION OF LEASE AND GUARANTY—SUFFICIENCY OF PROOF.—In this action on a guaranty of a lease the execution of the lease and the guaranty appeared both by failure to deny and by the averments of the answer and the complaint in intervention.

ID.—ACTION ON GUARANTY OF LEASE—EVIDENCE.—In such action it is material to show that the plaintiffs accepted possession of the premises from the lessee, and that their reason for doing so was the nonpayment of the rent.

ID.—SURRENDER OF PREMISES BY LESSEE—ACCEPTANCE BY LESSOR.—Upon the surrender of the key and abandonment of the premises by a lessee during the term, the lessors have a right to take possession and thus manifest their acceptance of the surrender, without being held to have evicted the lessee and absolved him from liability for rent.

ID.—EVICTION OF LESSEE—WHAT IS NOT—LIABILITY OF GUARANTOR FOR RENT.—Where a tenant, not under compulsion but voluntarily, gives up the premises and the landlord accepts the abandonment, there is no eviction, and guarantors of the lease are not discharged from liability for rent.

ID.—DEFAULT OF LESSEE—NECESSITY OF NOTICE TO GUARANTOR.—One who guarantees the payment of rent under a lease is not entitled to notice within reasonable time of the lessee's default in paying rent.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

William J. Herrin, for Appellants.

Rufus Hatch Kimball, for Respondents.

CHIPMAN, P. J.—The action is against defendants as guarantors under a certain lease in which intervener, Badt, was the lessee of the premises and plaintiffs were the lessors. The undertaking was attached to the lease and in terms covenants that the lessee will pay all rents monthly and execute other agreements, failing in which the guarantors “will forthwith pay unto them (plaintiffs) without previous demand on us all rents accrued and all damages incurred by reason of such failure, including attorney’s fees actually incurred or expended by them (plaintiffs) or their agents, Burnham & Marsh.”

It is alleged that the lessee entered into possession of the premises (a building on the northerly side of Bush Street near Franklin Street in the city of San Francisco) and paid the rent, one hundred and sixty dollars per month, to plaintiffs to and including April 14, 1907, and so continued in possession until and including June 1, 1908, on which last-named date plaintiffs “accepted possession thereof from said Badt . . . for the sole reason that the said Badt and the defendants, each and all, refused to pay the rent of said premises or any portion thereof”; that, except as hereinafter stated, Badt neglected and refused to pay rent after April 15, 1907, by reason whereof plaintiff commenced an action in the justice’s court against the defendants herein to recover rentals for the month commencing April 15, 1907, and recovered judgment therein which, on appeal to the superior court, was affirmed, and the said judgment in said superior court was paid and the judgment satisfied; that the whole of the rent accruing since May 15, 1907, is unpaid and defendants have refused to pay the same. Judgment was demanded for the sum of two thousand and eighty dollars, with

interest and five hundred and twenty dollars attorneys' fees. A motion was made by defendants to strike from the complaint the said proceedings in the justice's court and the superior court, some sixty or more folios, as redundant and immaterial, which motion was denied. Defendant, Basilio Assente, made default. Defendant Morton answered, denying that plaintiffs accepted possession of the premises from Badt because of the nonpayment of rent but that they wrongfully entered into possession June 1, 1908, and evicted Badt in violation of the lease. As a second defense, defendant Morton alleged that plaintiffs, without the consent of defendants or of Badt, on June 1, 1908, wrongfully took possession of the premises, "tore out and removed all of the fixtures, shelving and counters placed, constructed, used and owned therein by said P. L. Badt," by reason whereof defendants were "exonerated, released and discharged from said agreement, and undertaking" to pay plaintiffs. Wherefore defendant prays that plaintiffs recover nothing and that he be "exonerated, discharged and released from said guaranty annexed to said lease."

Intervener Badt, by leave of court, filed a complaint in intervention in which he made denials of the averments of plaintiff's complaint much the same as did the defendant. He set up several separate defenses entitled, third, fourth, and fifth defenses. A demurrer was sustained as to these and, no objection being made in the briefs to this order, these defenses need not be set out. In his second defense, intervenor alleges the making of said lease; that at its date, June 11, 1906, the building on said premises was in course of erection; that said building was to be used in carrying on a hardware business and was to be suitable for that purpose; that it was not completed until about August 1, 1906, on which date intervenor took possession and placed therein a stock of hardware of the value of five thousand dollars; that, in violation of said agreement, plaintiffs did not erect a building suitable for mercantile purposes or said hardware business; that, by reason of the defective and faulty construction of said building (as to which the particulars are set out), "when the rainy season began in the month of October, 1906, seepage, percolating, and surface waters oozed through said floor, walls, sidewalk and foundations, and dampened

and rusted said stock of hardware in said building to such an extent" as to render it unsalable; that said defects were unknown to intervener and could not be discovered by him by the use of ordinary diligence but that plaintiffs could have discovered such defects during the construction of the building had they used ordinary care in its supervision; that, about the — day of October, 1906, intervener gave plaintiffs notice in writing pursuant to section 1942 of the Civil Code, notifying them of said defects and plaintiffs thereupon commenced repairs on said building but said defects could not be and were not repaired, "and shortly thereafter intervener did remove his stock of hardware from said building whereby intervener suffered damage in the sum of five thousand dollars, no part of which has been paid." Intervener also alleged that at all the times set forth in the complaint he was and now is "wholly insolvent and unable to indemnify defendant, Thomas J. Morton, for any judgment that may be obtained against him."

Defendant Morton asked leave to file a proposed amendment to his answer, as a third defense, setting forth by way of plea in abatement the pendency, in the superior court, of another action "between defendant's principal P. L. Badt and the plaintiffs in this action; that in said action a copy of the process has been duly served upon defendant's principal P. L. Badt, and he has appeared therein, and said cause is at issue as to said Badt and undetermined." In support of the motion all the papers in the case are appended thereto and it is claimed that the said action was between the same parties as in this action and involved the same issues. The motion was denied.

The court found the averments of the complaint to be true except as to the amount of the alleged attorney's fee, five hundred and twenty dollars, and reduced the amount to two hundred and fifty dollars; that the denials in paragraphs I and II of the answer of defendant, Morton, are untrue; that the lease set up by Morton is the same lease set forth in plaintiffs' complaint; that plaintiffs did not oust Badt from the building and did not wrongfully or without the assent of Badt or the defendants go into possession or oust or eject Badt or wrongfully withhold the possession from him or defendants without his consent; that defendant Morton is not

exonerated or released from said agreement; that intervener, Badt, has no good or substantial defense to the action; that plaintiffs took possession of the premises with Badt's consent and in accordance with his wish; that at all times set forth in the complaint in intervention the said intervener was and is wholly insolvent.

The conclusions of law were: That plaintiffs are entitled to judgment against the defendants and Badt, the intervener, in the sum of one thousand seven hundred and twenty dollars, with interest upon the sums monthly as they accrued, from May 15, 1907, and also two hundred and fifty dollars, attorney's fees, and costs of suit. Judgment was entered accordingly.

1. Appellants' first point is that their special demurrer for misjoinder of parties should have been sustained because the lessee, Badt, was not made party defendant. In *Carver v. Steele*, 116 Cal. 116, 119, [58 Am. St. Rep. 156, 47 Pac. 1007], the court said: "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor." Furthermore, in the present case, Badt was wholly insolvent and hence it was not necessary to sue him. (Civ. Code, secs. 2800, 2801.) Besides, Badt was allowed to make himself a party.

2. The court refused to strike out the alleged redundant matter in the complaint setting forth the action in the justice's court. The facts were probative and had no proper place in the complaint and should have been stricken out, but the refusal of the court to grant the motion is not ground for reversal of the judgment. It does not appear that defendants were in any wise prejudiced by the retention of this redundant matter. (*Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 684, [32 L. R. A. 193, 44 Pac. 320].)

3. It is claimed that the court erred in denying defendant Morton's motion to file an amended answer. It is contended that the action sought to be pleaded in abatement involved the same parties and the same issues and that had a judgment been rendered in the case "it would have been offered as a plea in bar of this action." (Citing *Hall v. Susskind*.

109 Cal. 203, [41 Pac. 1012]; Code Civ. Proc., sec. 1908, subd. 2.) The action of Badt against the plaintiffs here was to recover damages for the defective construction of the building and the consequent injury to intervenor's goods. The guarantors, defendants here, were not parties to that action and the action did not involve the payment of rentals. The question of the liability of the sureties not having been involved, a judgment in the action of Badt v. these plaintiffs, would not necessarily be a bar to this action. The rule laid down in *Hall v. Susskind* is not met by the facts pleaded in *Badt v. Boschetti and Magnani*.

4. Error is claimed of the court's refusal to sustain defendant's motion for a nonsuit for the reason that certain material averments of the complaint are not supported by any evidence, viz.: that the lease was not offered in evidence; that the execution of the guaranty by defendant, Morton, was not shown; that there was no evidence to sustain the averment "that plaintiffs accepted possession for the sole reason that the defendant, Morton, or either of them, refused to pay the rent"; that there was no evidence in support of the averments relating to the proceedings and judgment in the justice's court for a month's rent and the payment of the judgment.

The execution of the lease and the guaranty appeared both by failure to deny and by the averments of the answer and the complaint in intervention. So far as the proceedings for the recovery of one month's rent are concerned, we cannot see that they were material to the issues in this case. At most they tended to show what otherwise appeared,—namely, that the lease and guaranty were executed as alleged, and whether that judgment was or was not paid is not material, since the present action excludes any claim for that month. It was material to show, which was denied, that plaintiffs accepted possession of the premises from Badt, the lessee, and that their reason for doing so was the nonpayment of the rent. The court found: "That plaintiffs accepted and took possession of the premises described in the lease set forth in the complaint herein on the first day of June, 1908, in accordance with the consent of P. L. Badt." Badt testified that he gave up the key of the premises to Burnham & Marsh, plaintiffs' agents. "I left the key with Mr. Merri-

man (in the agents' office). When I handed him the key I told him I had moved out of the premises. . . . The key I handed him was the key to the front door. There was no key to the back door. I had dealt with Burnham & Marsh before as the agents of the plaintiffs. It was that fact that took me back again, and that caused me on that occasion to go there and give up the key to Mr. Merriman. I may have told Mr. Merriman that the business was not paying me and that therefore I moved out. After I gave the key to Mr. Merriman I never asked for it back. I never went after that." He testified that he never asked the plaintiffs or either of them for the key and never told them that he wanted possession again; that he had no further use for the premises and did not want to be liable for further rent and took that means of relieving himself. It appeared that Badt passed the premises after plaintiffs took possession and saw them taking down a partition and some shelving. He did not then object or make any inquiry as to why plaintiffs were in possession.

Boschetti, one of the plaintiffs, testified that he removed a partition in the rear of the store-room, took down some shelving and loosened the counter from the floor; that "those fixtures are lying there now. Mr. Badt never asked me to give him those fixtures. I never withheld them from him and nobody ever asked me for them." There is some conflict as to Badt's intention after moving out and there was some evidence tending to show that he made an effort to rent the premises, thus negating the idea of an abandonment of the lease or surrender of possession. We think, however, there was sufficient evidence to justify the finding of the trial court. Upon the surrender of the key and abandonment of the premises plaintiffs had a right to take possession and thus manifest their acceptance of the surrender. (*Welcome v. Hess*, 90 Cal. 507, [25 Am. St. Rep. 145, 27 Pac. 369]; *Adams v. Weaver*, 117 Cal. 47, [48 Pac. 972].) *McAlester v. Landers*, 70 Cal. 79, 84, [11 Pac. 505], cited by appellant, was a case of undisputed eviction and took place prior to default in payment of rent for which the guarantor was sued. The point there was that, because the lessee could recoup his damages from the unpaid rent, the lessor's rights against him were thus so impaired as to release the guarantor, but the case does not apply here: first, because there was no eviction and, second, the alleged eviction

took place after the liability had accrued for which the action was brought. Releasing the lessor from liability for future rent did not affect the lessee's liability for rent already accrued. (*Boyd v. Gore*, 143 Wis. 531, [21 Ann. Cas. 1263, 128 N. W. 68].) The facts do not show exoneration of the guarantors under section 2819 of the Civil Code, for there was no act of the lessors altering the obligation of the lessee, or in any way impairing or suspending the rights of the lessors against the lessee. Respondents cite *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 31, [10 Ann. Cas. 357, 9 L. R. A. (N. S.) 557, 80 C. C. A. 97], to the proposition that even an eviction could not impair a matured obligation of the lessee and hence could not discharge the guarantors to make good on such an obligation. The case cited appears fully to sustain this contention. It is not necessary to rest the decision upon this proposition. Where a tenant, not under compulsion but voluntarily, gives up the premises and the landlord accepts the abandonment, there can be no eviction. (24 Cyc. 1130.)

5. It is urged that because defendant Morton had no notice of the action of the lessors the guarantors had no opportunity to re-let the property or to take other steps to recoup their loss. This contention is based on Morton's second defense that his principal, Badt, was ousted by plaintiffs and such ouster released the guarantors under section 2819 of the Civil Code. As already stated, there having been no ouster, this section and the cases cited cannot avail appellant. Furthermore, the guaranty expressly provides that the guarantors, on the failure of the lessee to pay his rent, "will forthwith pay unto them (the lessors) without previous demand on us all rents accrued and all damages incurred by reason of such failure, including attorney's fees."

6. The foregoing is sufficient also to answer appellant's contentions in support of his appeal from the order denying a new trial.

7. It is further urged that the complaint fails to state a cause of action and the demurrer thereto should have been sustained, because it failed to state whether the plaintiffs notified defendant, Morton, within a reasonable time, that default had been made in the payment of rent. Section 2807 of the Civil Code would seem a sufficient answer. "A guarantor of payment of performance is liable to the guarantee immediately

upon the default of the principal, and without demand or notice." When the guaranty is of a conditional obligation the guarantor's "liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor had actual notice thereof." (Civ. Code, sec. 2808.) As was said in *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, [10 Ann. Cas. 357, 9 L. R. A. (N. S.) 557, 80 C. C. A. 97]. "The contract of suretyship is not that the obligee will see that the principal pays his debt or fulfills his contract, but that the surety will see that the principal pays or performs." We have already shown that by the terms of the guaranty the guarantors were not entitled to notice of the lessee's default.

We discover no points made in intervener's brief not covered in considering the appeal of defendant Morton. Both Badt and Morton rely upon substantially the same alleged errors.

The judgment and order are affirmed.

Hart, J, and Burnett, J., concurred.

[Civ. No. 1124. Third Appellate District.—November 22, 1913.]

J. NAHL, Appellant, v. ALTA IRRIGATION DISTRICT
et al., Respondents.

WATERS AND WATERCOURSES—IRRIGATION DITCH—DUTY OF OWNER TO PREVENT INJURY TO OTHERS.—The owner of an irrigation ditch must so construct and maintain it as that, in its operation, by the exercise of reasonable or ordinary care, no damage will result to others. To him applies the principle that one must so use his own property as not to injure that of others.

1D.—DEGREE OF CARE EXACTED FROM OWNER OF DITCH.—Such owner, however, is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise only reasonable or ordinary care in the construction, maintenance, and operation of his ditches.

ID.—ACT OF GOD—LIABILITY OF OWNER OF DITCH OR CANAL.—A ditch or canal owner is not responsible for that which is solely the result of an act of God, or inevitable accident; it is only when human agency is combined with the act of God, and neglect occurs in the employment of such agency, that a liability for damage results from such neglect.

ID.—OVERFLOW DUE TO EXTRAORDINARY FLOODS—LIABILITY OF OWNER OF DITCH.—In this action against an irrigation company for damages occasioned by an overflow of one of its ditches, flooding the plaintiff's land and destroying eucalyptus trees thereon, the evidence is sufficient to justify the findings of the court that the overflow and consequent damages were not due to any fault or negligence of the defendant, but to extraordinary rainfall and unprecedented storms.

ID.—CONFLICTING EVIDENCE—REVIEW ON APPEAL.—Where upon some of the main points the evidence is conflicting, and nothing appears upon the face of the testimony from which the findings must have been reached indicating the improbability of its verity, an appellate court, upon a review of the case, must abide by the decision of the trial court upon the ultimate result arrived at by it from such testimony.

APPEAL from a judgment of the Superior Court of Tulare County. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Austin Lewis, and R. M. Royce, for Appellant.

Power & McFadzean, and Joe D. Greene, for Respondents.

HART, J.—In the month of March, 1911, the plaintiff's land, embracing forty acres and situated in near proximity to one of the water ditches of the defendant corporation, in Tulare County, this state, was inundated by water, and a large number of eucalyptus trees which he had planted and was cultivating on said land was thereby destroyed. In his complaint, the plaintiff charges that the damage to his land and trees was caused by the inundation of said land from water running in and through the corporation's ditch, and that said overflowing of said water was entirely and directly due to the inexcusable negligence of the defendant corporation and the members of its board of directors, named above as the other defendants herein. The complaint alleges that the damage

thus sustained by the plaintiff amounted in the aggregate to the sum of \$4,753.60, for which judgment is prayed.

The answer specifically denies the averments of the complaint, and alleges, by way of a special defense, that the ditch from which the water overflowing the plaintiff's land is alleged in the complaint to have come has been at all times, prior to the date of said overflow and damage, maintained in perfect condition, and that, if the land of the plaintiff was inundated as described in the complaint, it was "the result of superhuman causes, viz: extraordinary and unprecedented floods, which human foresight could not guard against or control, caused by extraordinary rainfall and unprecedented storms in the northern part of the county of Tulare, where plaintiff's land is situate, and the southern part of the county of Fresno, and particularly in the Sierra Nevada Mountains, north and east of plaintiff's land, in the latter part of February and the early part of March, in the year 1911, which rains, storms, and resulting floods swept over and inundated a great part of the territory above described, including plaintiff's said land," etc.

The case was tried by the court without a jury, and the findings of fact are in accord with the special defense set up by the defendants. The court found that the land of the plaintiff was overflowed and, as result thereof, the eucalyptus trees growing thereon were destroyed, in the month of March, 1911, but further found that the said overflow and the destruction of said trees thereby directly resulted from "the flood waters of a certain torrential stream known as Sand Creek, which rises in the Sierra Nevada Mountains in said county, and naturally flows through and across the defendant district and naturally spreads over said land of the plaintiff as well as other lands in the vicinity of the plaintiff's land in times of extraordinary flood; . . . ; that plaintiff's said land was not overflowed and the trees thereon were not injured, damaged or destroyed by reason of any carelessness or negligence on the part of said defendants, or any of them, nor by reason of the overflowing or bursting of the ditch described in the complaint, but, on the contrary, the flooding of plaintiff's land and the destruction of his said trees, as aforesaid, was the result of inevitable accident which human foresight could not guard against or control," etc., here substantially following

the allegations of the answer; "that the ditch of defendants referred to in said complaint was properly and carefully constructed in the year 1891, or the year 1892, and was in good repair and suitable for irrigation purposes at the time said flood occurred, and did not at all contribute to or bring about the flooding of plaintiff's said land or the destruction of his said trees, or any thereof; and that plaintiff was not, and has not been, damaged or injured by any act or omission of said defendants, or by reason of the construction or existence of said ditch, or by reason of the manner in which the same was kept or maintained by said defendants or otherwise in any of the sums or amounts specified in his complaint, or in any sum or amount whatsoever," etc.

In accordance with the foregoing findings, judgment was rendered and entered in favor of the defendants and against the plaintiff.

This appeal is prosecuted by the plaintiff from said judgment, the record having been made up in accordance with the new or alternative method of taking appeals.

The plaintiff, in his briefs, declares that there are two questions presented by this appeal, to wit: "One of fact—how did the flooding of plaintiff's land occur? and one of law—is the Alta Irrigation District liable?" But there is in reality but one question in the case, viz.: Does the evidence support the findings? There can, of course, be no question as to the duty and obligations resting upon the owner of an irrigating ditch in his relations as such with the public. He must so construct and maintain it as that, in its operation, by the exercise of reasonable or ordinary care, no damage will result to others. To him, as well as to all persons, must obviously be applied the principle that one must so use his own property as not to injure that of others, or, as that trite doctrine is otherwise more tersely and classically expressed, *Sic utere tuo ut alienum non laedas*. "He is bound to keep his ditch in good repair, so that the water will not overflow or break through its banks and destroy or damage the lands of other parties, and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the creek" and injures or destroys the land or property of others, the law will hold him responsible therefor. (*Richardson v. Kier*, 34 Cal. 63, 74, [91 Am. Dec. 681].) But he is not

an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of his ditches. (3 Current Law, p. 1125, notes 106 and 110; *King v. Miles City Irr. Co.*, 16 Mont. 463, [50 Am. St. Rep. 506, 41 Pac. 431]; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Grand Val. Irr. Co., v. Pitzer*, 14 Colo. App. 123, [59 Pac. 420]; Weil on Water-rights in the Western States, 2d ed., pp. 256, 257.) Nor is a ditch or canal owner responsible for that which is solely the result of the act of God, or inevitable accident. It is only when human agency is combined with the act of God and neglect occurs in the employment of such agency, that a liability for damage results from such neglect. (*Polack v. Pioche*, 35 Cal. 416, [95 Am. Dec. 115]; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197, 202; *Proctor v. Jennings*, 6 Nev. 83, 88, 90, [3 Am. Rep. 240]; *Jordan v. Mount Pleasant*, 15 Utah, 449, [49 Pac. 746]; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, [72 Am. St. Rep. 784, 786, [54 Pac. 1009]; *Mathews v. Kinsell*, 41 Cal. 512; monographic note to *McCoy v. Danley*, 57 Am. Dec. 690, 691; *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353, [21 Am. St. Rep. 740, and note, 26 N. E. 305].)

Thus we have stated some of the general principles which apply to the owners of irrigation companies and by the light of which the court below no doubt considered and reached its conclusion upon the evidence.

Now, the single question submitted for determination by this court is, as before stated, whether the evidence supports the findings, and to this question we conceive it to be clear, after an examination of the record, that an affirmative answer must be returned, and the judgment cannot, therefore, justly be disturbed.

It is deemed unnecessary to present herein a detailed statement of the testimony, of which a large amount was heard by the court. It will be sufficient, for the purposes of this decision, merely to state, in a general way, the evidence produced before the court.

Upon some of the main points the evidence is conflicting, but no proposition is more familiar to the profession than that where such a condition exists as to the evidence, and nothing

appears upon the face of the testimony from which the findings must have been reached indicating the improbability of its verity, an appellate court, upon a review of the case, must abide by the decision of the trial court upon the ultimate result arrived at by it from such testimony.

The situation, as disclosed by the record, appears to be this: The defendant corporation is the owner of and maintains an irrigation system of considerable magnitude in Tulare County. This system consists of a number of main canals or ditches, one of which, as seen, runs in close proximity to the plaintiff's land which it is claimed was inundated by the water from said ditch. The source of the water supply for said irrigation system is King's River.

The plaintiff testified that the water which overflowed his land broke over and through the banks of the ditch at a point where a bridge, comprising a part of a road, crosses said ditch a short distance west of said land. He further testified, as did some other witnesses testifying in his behalf, that the ditch at the point where the water broke through and over its banks was very shallow; that there was a ridge or "hump," as he termed it, at the bottom of the ditch at that point which was due to the fact that the soil thereat was of a hard-pan nature, difficult to dig into and that the defendant, by reason thereof, failed to make it of sufficient depth to be capable of carrying the amount of water required for its use for irrigation purposes. He further declared, as did some of his other witnesses, that a large quantity of old tin cans and other débris or refuse matter had been dumped into the ditch near the bridge, thereby filling up the channel so that it obstructed the free flow of the water, and caused the banks to give way under the extraordinary pressure of the flood waters which passed through the ditch at the time of the overflow of his land. All this testimony, however, was directly contradicted by Mr. Rice, superintendent of the defendant corporation, and other witnesses produced by the defendants. They said that, at the point at which the water is alleged to have flowed from the ditch over the plaintiff's land, the channel of the ditch was of sufficient depth to safely hold and carry the usual amount of water turned into the ditch from King's River for the purpose of irrigating, when necessary, all the lands in the district and situated within that part of the district in which the plaintiff's

land is located; that no obstruction to the free and ordinary flow of the water in the ditch existed at the point near the bridge, as described by the plaintiff and his witnesses; that there were no old tin cans or other rubbish in the channel of the ditch, as stated by the plaintiff and other witnesses testifying for him. Rice further testified that the company, prior to the time of the inundation of the plaintiff's land, had turned no water from King's River into the particular ditch from which the water flowed over and upon the land of the plaintiff, and in this statement he was corroborated by other witnesses. It was further shown, as the court found, that, commencing in the latter part of February, 1911, and continuing up to the early days of March of that year, and previously to the flooding of the plaintiff's land, heavy and almost unprecedented rainstorms prevailed in the northern part of Tulare County, with the result that a number of creeks, having their source in the Sierra Nevada Mountains and whose courses are southward, generally speaking, and through portions of the district of the defendant corporation, were surcharged with water. One of these ravines or creeks is known as Sand Creek. This creek passes over the ditch to which the complaint attributes the direct source of the inundation of the plaintiff's land at a point not far distant from said land, and when, as in the months of February and March of the year 1911, its channel is filled with water because of an unusual precipitation of rain, the water therein, after passing the ditch, spreads out and over the lands situated in the vicinity of that of the plaintiff. And, according to certain testimony produced by the defendants—testimony sufficient to support the findings in that regard—the overflow of the plaintiff's land, as well as a large area of other lands contiguous thereto, was occasioned entirely by the extraordinary quantity of water received into the channel of Sand Creek by reason of the heavy rainstorms which prevailed in the latter part of February and the early part of March, 1911, throughout the watersheds from which said creek obtains its water, and that said overflow would have occurred even if the ditch had not existed.

There is evidence in the record that the ditch referred to in the complaint had been constructed some twenty years prior to the time of the flood in question here, and that during all of said period of time it had been in good condition and always

sufficient in every respect to meet the requirements of the district and the water users. It was shown that, up to the time of the flood and immediately thereafter, the ditch was capable of carrying all the water required for irrigation purposes in the neighborhood of the plaintiff's land, and that it did do so after the flood.

But it is conceived that a further review of the evidence is unnecessary. As stated in the beginning, there is an abundance of evidence upon which the court was justified in predicating its findings that the flooding of the plaintiff's land and the consequent destruction of his eucalyptus trees were not due to any fault or negligence of the defendants, but were occasioned solely by a superhuman cause or one beyond the control of human agency.

The judgment is, accordingly, affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 298. Second Appellate District.—November 25, 1913.]

THE PEOPLE, Respondent, v. AVALON CRAMLEY,
Appellant.

CRIMINAL LAW—HOMICIDE—SUFFICIENCY OF EVIDENCE.—In this prosecution for homicide the evidence is sufficient to sustain the conviction of manslaughter, both as showing that a crime was committed and that the defendant was the perpetrator thereof.

ID.—REASONABLE DOUBT—SUFFICIENCY OF INSTRUCTIONS.—An instruction that "if, by the evidence adduced in a criminal action, there is raised in the minds of the jury, upon any hypothesis reasonably consistent with the evidence, a reasonable doubt as to any fact necessary to a conviction, that doubt must be resolved in favor of the defendant," is not erroneous in failing to set out or specify what facts are necessary to warrant a conviction, when the charge as contained in the information is read to the jury in other instructions given by the court, and the jury is told that every material allegation contained in the information is required to be established by proof beyond a reasonable doubt, before a verdict of guilty can be rendered.

ID.—PRESUMPTION OF INNOCENCE—REFUSAL OF INSTRUCTIONS.—The refusal of the court to instruct the jury that "the presumption of innocence is one to which the law is partial," and "that where conflicting presumptions supervene, the presumption of innocence must

be deemed superior," is not error, if the jury is further instructed that the presumption of innocence must be overcome by the prosecution to the extent that all material facts should be established to the satisfaction of the jury and beyond a reasonable doubt, and the evidence discloses no situation where there arises a conflict of presumptions.

ID.—INSTRUCTIONS TO JURY—USE OF DIFFERENT LANGUAGE BY COURT.—

The fact that the court may employ different language in its instructions from that which the defendant may desire shall be used in presenting the same matter to the jury, is not good ground for objection.

ID.—MANSLAUGHTER—PROPRIETY OF INSTRUCTION DEFINING.—

Where the accused in a homicide case pleads not guilty and seeks to show from the circumstances surrounding the death that the deceased destroyed himself, the court may, of its own motion, properly read to the jury instructions defining the crime of manslaughter; and the defendant cannot complain of a verdict of manslaughter, which is more favorable to him than one which the jury might well have returned under the evidence.

ID.—MOTIVE FOR HOMICIDE—INSTRUCTIONS WHERE EVIDENCE DIRECT.—

Where much of the evidence in a homicide case is direct and not by way of circumstance, it would not be proper to tell the jury that, under the evidence, proof of express motive is controlling.

ID.—CROSS-EXAMINATION OF WITNESS—STRIKING OUT ANSWER—HARMLESS ERROR.—

The accused cannot predicate prejudicial error upon the ruling of the court in striking out an answer to a question on cross-examination, if the witness is afterward allowed to answer in regard to the subject of inquiry and thereby give the defendant the benefit of such testimony.

ID.—MISCONDUCT OF COUNSEL—ABSENCE OF OBJECTION—REVIEW ON APPEAL.—

An alleged improper statement by the district attorney in a homicide trial cannot be complained of on appeal, if the defendant neither objected to the statement nor asked the court to strike it from the record.

ID.—IMPROPER QUESTION TO WITNESS—REPRIMANDING ATTORNEY.—

It is improper in a homicide case for counsel for the defendant to ask the wife of the deceased on cross-examination if she was arrested about three weeks before for shoplifting, and the court properly reprimands him for asking it.

ID.—MISCONDUCT OF COURT—COMMENT ON ATTORNEY'S INTELLIGENCE.—

A statement by the court to counsel for the defendant, "I am going to rule in your favor if you have sense enough to keep quiet," is not prejudicial error. The matter of the interchange of courtesies between the judge on the bench and counsel at the bar has been said never to come within purview of a proper subject for review,

unless it appears reasonably that the jury has been affected in a way prejudicial to the rights of the defendant.

ID.—VIEW OF PREMISES—EVIDENCE OF CHANGE IN CONDITION.—After the jury in a homicide case, pursuant to a request joined in by the defendant, has viewed the premises where the crime was committed, the prosecution may be allowed to account for any change in their condition, between their state as shown by the evidence and their appearance at the time the jury inspected them.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Chas. S. McKelvey, and W. H. Stevens, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendant was charged with having, on the twenty-third day of November, 1912, killed and murdered one Joseph W. Fear. Upon trial being had he was found guilty of the crime of manslaughter. Thereafter a motion for a new trial was made and denied, and judgment followed. This appeal was then taken from the order denying the motion for a new trial and from the judgment.

On the day of the alleged homicide deceased was visiting at the house of one Nellie Greaney at Pasadena. Mrs. Greaney occupied apartments consisting of three rooms. The wife of deceased, during the absence of her husband, had resided with Mrs. Greaney, but at the time Fear met his death his wife had gone to the county of San Bernardino. It may be gathered from the evidence that Fear had left Pasadena sometime before the twenty-third day of November, intending to go to Arizona, but had turned back after reaching Johannesburg. He did not find his wife at home when he returned, but called upon and conversed with Nellie Greaney, being well acquainted with that person. The defendant was also an acquaintance of both Nellie Greaney and Fear. On the evening of November 23d, the defendant and Nellie Greaney came to the apartments about 6 o'clock, and shortly thereafter Fear came in. Nellie Greaney testified that Fear had some whiskey and that

they all partook of it, and that Fear seated himself in a chair, while the defendant remained standing. She testified further that she retired into the bath room, which was immediately adjoining the room in which the two men were, in order to take some medicine, and that she remained there for perhaps fifteen minutes. She was very indefinite in her statement as to the approximate time that she remained in the bath room, and also uncertain as to whether she left the door which connected the two rooms open or not. When she did return to the room where she had left the men, defendant was not there, and she observed Fear in the act of falling from his chair and bleeding profusely. It developed that he had been cut in the neck, the instrument used leaving a knife-like wound. The jugular vein had been severed and Fear died within a few minutes without speaking. A brother of defendant, who was employed in a restaurant at Pasadena, testified that defendant on the evening in question entered the restaurant and asked whether the witness had any money. This brother replied that he had one dollar and fifty cents, when defendant said: "Give it to me, I have cut Fear and am going to beat it." On cross-examination counsel for defendant endeavored to secure from the witness a qualification of the statement as to what defendant had there said, and was successful to the extent that the witness admitted that defendant might have said that Fear had been cut, without stating that he (defendant) had done the cutting. Defendant did immediately leave Pasadena and went to the home of his father at Chino, where he was arrested on the day following. Nellie Greaney testified also that the men had not quarreled on the evening of the alleged homicide, and that she had heard no sound of struggle in the apartment while she was in the bath room. No knife of any kind was found upon or about the deceased's body. Police officers who came to the scene immediately upon being notified of the tragedy, found no weapons about the place, although some search was made. At a subsequent time a large revolver was found under a settee, of a kind like one which Nellie Greaney testified the deceased had carried. A great many empty bottles were found standing about the place, indicating that the inmates were in the habit of partaking freely of liquor. In one of the pockets of deceased's clothing was found a bottle of whiskey and in another

pocket a bottle of wine. Nellie Greaney gave testimony to the effect that deceased was of a melancholy temperament and that he seemed despondent because his wife had gone away. Briefly, this statement embraces the material testimony as to the facts upon which the jury founded its verdict, and it must be said that the evidence was sufficient to sustain the conviction, both as showing that a crime had been committed and that defendant was the perpetrator thereof.

A great many alleged errors occurring during the course of the trial are assigned as grounds for a reversal of the order and judgment. Among other instructions the trial judge gave the following: "If, by the evidence adduced in a criminal action, there is raised in the minds of the jury, upon any hypothesis reasonably consistent with the evidence, a reasonable doubt as to any fact necessary to a conviction, that doubt must be resolved in favor of the defendant." It is complained that this instruction was incomplete in that it did not set out or specify what facts were necessary to warrant a conviction. The charge as contained in the information was read to the jury in other instructions given by the court, and the jury was told that every material allegation contained in the information was required to be established by the proof beyond a reasonable doubt, before a verdict of guilty could be rendered. Considering these instructions in connection with the instruction to which criticism is pointed, no error appears.

The alleged error arising upon the failure of the court to give the instruction offered by defendant to the effect that "the presumption of innocence is one to which the law is partial," and "that where conflicting presumptions supervene, the presumption of innocence must be deemed superior," must be construed in a similar light. The offered instruction was taken from a standard text-book and no fault can be found with the statement of the law therein contained, but the instruction as offered was lengthy and considered in its entire substance was argumentative, and might well have been refused on that ground. But the court very fairly and fully covered the matters sought to be impressed upon the jury by instructing in positive terms that the presumption of innocence must be overcome by the prosecution to the extent that all material facts should be established to the satisfaction of the jury and beyond a reasonable doubt. Further, the evi-

dence disclosed no situation where there would arise a conflict of presumptions, and hence it was not important to defendant's rights to point out that the presumption of innocence would override those of lesser degree.

The proposition that the jury should be satisfied beyond a reasonable doubt and to a moral certainty that the death of Fear was not "occasioned by natural causes, by accident, nor by the act of deceased himself," as set forth in an instruction offered by defendant and refused, was fully and carefully covered by the instruction of the trial judge, No. XVII. Because the court may employ different language in its instructions from that which defendant may desire shall be used in presenting the same matter to the jury, is not good ground for objection, and the complaint here rests upon no other ground.

The court of its own motion read to the jury certain instructions defining the crime of manslaughter. This course appellant asserts constituted prejudicial error. The decision of the case of *People v. Huntington*, 138 Cal. 261, [70 Pac. 284], is cited in support of that contention. The facts of the case of *People v. Huntington*, were very different in character from those presented here. In the *Huntington* case the accused was charged with the murder of a young woman upon whom it was claimed he had committed an abortion. The defense was that the defendant did not commit the abortion, but treated the deceased for some disease and that she had died under an operation, "probably from the effects of an anaesthetic." The trial judge in that case injected into it a new theory and one wholly without the contentions or claims of the prosecution, when he instructed the jury that if they found that defendant was treating the deceased for some ailment and that he so treated her "without due caution or circumspection," they might find him guilty of manslaughter. In the light of the facts and the contentions made by the people and defendant at that trial, the error of the court becomes apparent. Not so here. The defendant stated upon his plea that he was not guilty and sought to have it appear that the circumstances surrounding the death of Fear indicated that the latter had destroyed himself. The jury did not so construe the evidence, and having determined that Fear was unlawfully killed by the defendant, they were justified, and it was their duty

to determine the degree of the crime; and upon this subject they were entitled to have stated the law defining the crime of manslaughter. Why should defendant complain because the verdict was more favorable to him than one which the jury might well have returned under the evidence? In the case of *People v. Muhlner*, 115 Cal. 303, [47 Pac. 128], the decision shows that the superior court granted to the defendant, charged with murder and convicted of manslaughter, a new trial for reasons identical with those urged on behalf of appellant here. The supreme court reversed that order and held that the conviction was without error. The last mentioned case is cited and affirmed in *People v. Coulter*, 145 Cal. 66, [78 Pac. 348.]

Again, appellant complains because the court refused an instruction touching the matter of motive for the commission of the offense, and particularly because of the refusal to instruct that "it is in cases of proof by circumstantial evidence that the motive often becomes not only material but controlling, and in such cases the facts from which motive may be established must be proved." It is a matter for comment that counsel for appellant could not have gleaned from the five typewritten pages covered by the one instruction on the subject of motive, which was given by the trial judge, enough to comprehend so much as was pertinent of the idea which they desired to have stated in the brief four lines of the refused instruction. Moreover, it would not have been proper to have told the jury that under the evidence in this case, much of which was direct and not by way of circumstance, that proof of express motive was controlling.

Contentions are made that in other particulars the charge to the jury contained erroneous statements of the law; also that the court erred in refusing other instructions offered. These contentions appear to be without merit. The trial judge gave very full instructions and fairly advised the jury upon all the propositions of law material to the case.

Appellant complains that the court erred in striking out an answer of the witness Nellie Greaney, elicited on cross-examination and in which the witness related the subject of a conversation that had occurred between her and deceased on the evening before the occurrence of the alleged homicide. This testimony was brought out in aid of the theory of defend-

ant that Fear had committed suicide, in that it tended to show that he was despondent over the fact that his wife had gone away. There would be merit in the contention of appellant did it not appear that the witness had referred to a day anterior to that as to which she had been examined in chief. The particular answer was properly stricken out as not coming within the limits of the rule of strict cross-examination, but there is a stronger reason why no claim of prejudicial error can be predicated upon the ruling of the court. The witness was subsequently allowed to answer fully as to having had substantially the same conversation with Fear on the next day, that is, the day of the alleged homicide. If this testimony was entitled to any weight as illustrating the state of mind of deceased, the defendant was given the benefit of it.

Questions asked of witness John Richardson as to interrogatories which he had put to Nellie Greaney shortly after the alleged homicide, were proper to be asked for the limited purpose which the court allowed them. The jury was specially instructed as to that matter.

Prejudicial misconduct of the district attorney is alleged: The statement complained of and referred to in the brief of counsel, where the deputy district attorney announced that he would be surprised if a brother of defendant answered "no" to a question asked for the purpose of showing conduct and statements inconsistent with the testimony given by him at the trial, was neither objected to as constituting misconduct, nor was the court asked to strike it from the record. No foundation to predicate error in such a case is shown. (*People v. Shears*, 133 Cal. 159, [65 Pac. 295]; *People v. Warr*, 22 Cal. App. 663, [136 Pac. 304].)

That the trial judge acted with bias which opposed the right of defendant to a fair trial, is an accusation made but not sustained by the record. When Mrs. Fear, the wife of deceased, was testifying, counsel for defendant asked her on cross-examination this question: "Mrs. Fear, are you the same Grace Fear that was arrested in Long Beach about three weeks ago for shoplifting?" This question was improper to be asked, and the court was altogether justified, when sustaining an objection thereto, in adding: "and counsel is reprimanded for asking the question." Again, when defendant's counsel expressed a desire to make a statement in argument of a mat-

ter then being presented, the trial judge said: "I am going to rule in your favor if you have sense enough to keep quiet"; following which remark counsel said: "I desire also, if the court is going to give his reasons, if the court will give his reason for telling me I have no sense." Then came this response from the bench: "Perhaps it would be too long to give the reasons. Proceed." Counsel states that the tone in which the remarks were uttered cannot be represented in the record. Neither is the attitude and demeanor which counsel may have assumed toward the court so represented. But there is nothing in the comment of the court, drastic as it may have been, that can be said to have prejudiced defendant's case in the eyes of the jury. The ruling of the court made at the time the words excepted to were uttered was in defendant's favor, and the most that the jury could have reasonably inferred would have been that in the opinion of the judge the defendant's counsel was deficient in intelligence or understanding. It cannot be assumed that this intimation prejudiced the jury against defendant, for it could reasonably have had the contrary effect. The decision of the court in the case of *People v. MacDonald*, 16 Cal. App. Dec. 974, (now pending before the supreme court on rehearing),* and cited by appellant, does not furnish an argument to sustain the claim of prejudice as here advanced. In the MacDonald case the criticism of this court was that the trial judge in reprimanding the counsel for defendant also gave character to the girl then being examined, which must have impressed the jury and added to the weight of the testimony she had given. This a trial judge may not do. The contention that the judge was guilty of prejudicial conduct in the trial of this case has no such ground to support it. The matter of the interchange of courtesies between the judge on the bench and counsel at the bar has been said never to come within purview of a proper subject for review, unless it appears reasonably that the jury have been affected in a way prejudicial to the rights of the defendant. (*People v. Modina*, 146 Cal. 142 [79 Pac. 842]; *People v. Casselman*, 10 Cal. App. 234, [101 Pac. 693].)

The objection that it was improper to allow the witness Ross to testify in rebuttal as to his having cleaned the rooms where

*The supreme court on March 30, 1914, rendered its decision affirming the judgment of conviction in this case. Its opinion is reported in 167 Cal. —, [140 Pac. 258]

the tragedy occurred after the day of the alleged homicide, possesses no merit. The defendant had joined in a request that the jury be permitted to view the premises, and after this view had been had the prosecution was very properly permitted to show what had been done in the rooms after the twenty-third day of November, in order to account for any change in their condition between their state as shown by the evidence and their appearance at the time the jury inspected them.

The record exhibits a case where the defendant has had a very fair trial and where the evidence fully supports his conviction.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1141. Third Appellate District.—November 25, 1913.]

C. S. BALDWIN, Appellant, v. F. O. WALLS, Treasurer of the Town of Alturas, Respondent.

APPEAL — ORDER SUSTAINING DEMURRER TO AMENDED COMPLAINT—

WHETHER APPEALABLE.—An order sustaining the defendant's demurrer to the plaintiff's amended complaint is not appealable. The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from the order sustaining the demurrer, that the plaintiff could appeal.

APPEAL from an order of the Superior Court of Modoc County sustaining a demurrer. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

C. S. Baldwin, and N. A. Cornish, for Appellant.

Jamison & Wylie, for Respondent.

BURNETT, J.—The notice of appeal specifies that "plaintiff C. S. Baldwin, in the above entitled action, hereby appeals to the supreme court of said state of California, from the order of the superior court of said county of Modoc, sustaining

defendant's demurrer to plaintiff's amended complaint in said action."

It is well settled that such order is not appealable. (Code Civ. Proc., sec. 939; *Agard v. Valencia*, 39 Cal. 292; *Ashley v. Olmstead*, 54 Cal. 616; *Hadsall v. Case*, 15 Cal. App. 541, [115 Pac. 330].)

As stated in the *Agard* case: "The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from the order sustaining the demurrer, that the plaintiff could appeal."

The purported appeal must be dismissed and it is so ordered.

Chipman, P. J., and Hart, J. concurred.

[Civ. No. 1127. Third Appellate District.—November 25, 1913.]

**WILLIAM A. WATERMAN, Respondent, v. VISALIA
ELECTRIC RAILROAD COMPANY, Appellant.**

**ELECTRIC RAILWAY—CAR STRIKING CHILD ON TRACK—ABILITY OF MOTOR-
MAN TO AVOID ACCIDENT.**—In this action against a railway com-
pany for the death of a child who wandered on the track and was
there struck by an electric car, it cannot be said that the jury was
not justified in adopting the theory that the motorman saw, or by
the exercise of ordinary care could have seen, the child in time to
avoid the accident.

ID.—NEGLIGENCE OF MOTHER OF CHILD—QUESTION FOR JURY.—Whether
the mother of the child was guilty of contributory negligence in
allowing it to be out of her sight fifteen minutes and wandering
on the railway track, during which time she was busy with her
household duties, is a debatable question and concluded by the find-
ing of the jury; the jury was not bound to find that contributory
negligence must be imputed to her.

ID.—FAILURE OF MOTORMAN TO SEE CHILD—GROSS NEGLIGENCE.—If
through carelessness the motorman failed to observe the perilous
position of the child in time to prevent the injury, he was properly
chargeable with gross negligence.

**ID.—LAST CLEAR CHANCE—NECESSITY OF ACTUAL KNOWLEDGE OF DAN-
GER.**—Liability under the doctrine of last clear chance is based on
the fact that the defendant actually knew of the danger, not on the

theory that he should, or by the exercise of ordinary care could, have discovered the peril. Hence it was error to instruct the jury that, while they believed the mother of the child to be chargeable with contributory negligence, they would still be justified in finding a verdict for the plaintiff if it was believed that the motorman, by the exercise of ordinary care, could have seen the child in time to avoid the accident.

ID.—DEFECTIVE BRAKES — INSTRUCTIONS ELIMINATING CONTRIBUTORY NEGLIGENCE.—If the plaintiff based the action on the negligence of the defendant in not equipping the car with suitable brakes, as well as on the carelessness of the motorman, it was error to so instruct the jury as to justify a verdict for the plaintiff on the theory that with suitable brakes the accident might have been prevented, since the doctrine of contributory negligence was thereby nullified.

ID.—EVIDENCE AS TO CONDITION OF BRAKES—INSTRUCTIONS.—The only reasonable inference from the evidence is that the brakes worked properly. Therefore the court should have given this instruction proposed by the defendant: "I instruct you that there is no evidence in this case to the effect that the brakes in defendant's car were inadequate or that defendant was negligent in respect to the braking equipment of said car or the condition thereof."

APPEAL from a judgment of the Superior Court of Tulare County and from an order refusing a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

J. W. McKinley, Frank Karr, Powers & McFadzean, and W. R. Millar, for Appellant.

Lamberson & Lamberson, and J. M. Burke, for Respondent.

BURNETT, J.—The appeal is from a judgment in favor of plaintiff and from an order denying the motion of defendant for a new trial in the action by the father to recover damages for the loss of earnings of an infant son who was killed by an electric car operated by servants of the defendant corporation. The complaint alleged that the death of the child was caused by the negligence, wantonness, and willfulness of the servants of defendant and that the defendant neglected to equip the car with proper or adequate brakes and that "said defendant carelessly and negligently permitted said car to become and remain out of repair in that

the brakes thereon had become weakened and unserviceable so that said car could not be stopped with reasonable certainty or celerity." The material allegations of the complaint were put in issue by the answer, and contributory negligence was also set up.

The contentions of appellant may be reduced to three: 1. The verdict is not supported by the evidence; 2. The court misdirected the jury to the prejudice of appellant; and, 3. The court erred in refusing certain instructions requested by defendant.

As to the first of these it is insisted that there was no substantial showing of negligence on the part of those in charge of the car. It appears that the accident occurred approximately on the crossing at the intersection of B and Walnut streets in Exeter, a town of probably a thousand inhabitants. The tracks are on Walnut Street, running east and west, and the car approached the crossing from the east. B Street extends north and south and the Waterman house was a short distance and north from Walnut Street and on the east side of B Street. There is a curve in the track a little less than four hundred feet from the crossing. At the time of the accident the car was traveling at the rate of about twenty miles an hour. It is the claim of appellant that, being uncontradicted, the following testimony of the motorman must be accepted as true: "As I proceeded down the road and toward Exeter, I saw a little child. As near as I could determine his location was at the west side of the crossing. He was on the track. When I first saw him I was about 150 feet from him, I should judge. When I first saw it it was just getting up on its hands and knees." He further testified that the sun was "right in my eyes" and "I then put on my brakes as quickly as I could, whistled and kept whistling. Besides that I reversed my car. The brakes that I threw on were the emergency brakes. That was done as soon as I discovered that there was a child there." From this, it is argued that the only reasonable inference is that the motorman, upon seeing the child, did everything possible to stop the car and that he used ordinary care in detecting the child's presence on the track.

On the other hand, respondent calls attention to the fact that the motorman had a full opportunity to see the child

when the car came upon the straight track but nevertheless the car traveled the four hundred feet east of the crossing and went on nearly two hundred feet west of the crossing before coming to a stop after striking the child. While the motorman, it is true, claims that the sun was "in his eyes," he nowhere asserts that this fact actually prevented him from seeing the child. Indeed, in one part of his testimony he states: "Before I got off the curve I could see the track down to where the child was." At the coroner's inquest, also, he said he was just coming on the straight track when he first saw the boy. He afterward modified this statement by saying that he was not sure that it was just when he was coming on to the straight track, and further on in the examination, that he was about two hundred feet from the crossing; but, in view of his inconsistent statements, we cannot say that the jury was not justified in adopting the theory that he did see, or by the exercise of ordinary care could have seen, the child in time to avoid the accident, the evidence showing that it required about three hundred feet in which to stop the car when it was running at the rate of twenty miles per hour. If through carelessness he failed to observe the perilous position of the child in time to prevent the injury, of course, it would follow that the motorman was properly chargeable with gross negligence.

Neither can it be said, we think, that the jury was bound to find that contributory negligence must be imputed to the mother for permitting the child to wander upon the track. The accident occurred about six o'clock P. M. and the child had been out of doors about half an hour. The mother was busy with her household duties but during this time she made frequent trips to the door to watch the child, going four or five times. She said: "I kept watch on the baby" and she saw him not more than fifteen minutes before he was killed and at that time he was by the steps with the oldest boy, who was nine years of age. The question of the mother's negligence, under the circumstances, we regard as debatable and, therefore, concluded by the finding of the jury. The following quotation from *Fox v. Oakland Consolidated Street Ry. Co.* 118 Cal. 55, [62 Am. St. Rep. 216, 50 Pac. 25], we consider applicable here: "Parents are chargeable with the exercise of ordinary care in the protection of their minor

children; and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes, without satisfying herself of his whereabouts, was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question. (*Schierhold v. North Beach etc. R. R. Co.*, 40 Cal. 447; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513, [38 Am. Rep. 67]; *Brickett v. Knickerbocker Ice Co.*, 110 N. Y. 504, [18 N. E. 108].)"

But respondent contends that, regardless of the question of contributory negligence, there was sufficient evidence to justify the verdict upon the theory that defendant had a clear opportunity, by the exercise of ordinary care, to avoid the accident. It is insisted that the doctrine is correctly declared in the Fox case, where it is said: "But were defendant's contention sustainable in this respect (as to contributory negligence) it would not necessarily determine the plaintiff's right to recover. There was evidence tending to show that when the child went upon the railroad track he was a sufficient distance in advance of the approaching car to have enabled those in charge thereof, by the exercise of ordinary care, to have stopped before striking him. This evidence, if believed by the jury, and their verdict implies that it would tend to show a gross negligence on the part of defendant's servants, and justify a finding for plaintiff notwithstanding the negligence of the parents in permitting the child to be in the street. This is upon the principle, now firmly established in this state, that a party having an opportunity by the exercise of proper care to avoid injuring another must do so, notwithstanding the latter has placed himself in the situation of danger by his own negligence or wrong." (Citing cases.)

This quotation suggests one of the most important questions involved herein and which has received careful attention from counsel. By respondent it is contended that, under the peculiar circumstances, if the motorman saw or by the exercise of ordinary care could have seen, the child on the track in time to avoid the injury, we have a case for the application of what is known to the profession as "the last clear chance" principle. Appellant contends that it can be invoked only when the servant has *actual knowledge* of the

dangerous situation. The matter is important for the reason that the court adopted respondent's view and gave to the jury this instruction: "But should you find that defendant was guilty of some negligence, and should you further find from the evidence that the negligence of defendant contributed directly or proximately to the death of said child, and should you further find from the evidence that the said child or his father or the person or persons charged with the care and control of said child at the time were also guilty of negligence which contributed directly or proximately with the negligence of defendant to his death, then I instruct you that your verdict must still be in favor of defendant, unless you also find that notwithstanding plaintiff's negligence defendant could with reasonable care have avoided injuring said child." And also: "If said child was killed through the mutual fault of himself or those having the care and control of him at the time of the accident and of the servants or agents of the defendant company, directly or proximately contributing thereto, then your verdict must be for the defendant, unless it appears that injury to the child could have been avoided by the exercise of reasonable diligence on the part of defendant."

It is apparent that, under these instructions, the jury, believing that the mother of the child was chargeable with contributory negligence, would still be justified in finding a verdict for plaintiff if it was believed that the motorman, by the exercise of ordinary care, could have seen the child in time to avoid the accident, and it may be that the verdict was based upon that theory.

Many cases from other jurisdictions and some from our own state and various text books are cited by respondent in favor of his contention. They have been examined and, it must be said they lend support to his position, but the question has been set at rest in this state by the recent decisions of the supreme court of which it will only be necessary to refer to the case of *Thompson v. Los Angeles and San Diego Beach Railway Co.*, 165 Cal. 748, [134 Pac. 709]. The lower court in that case gave the following instruction: "I instruct you that one having knowledge of the dangerous situation of another, and having a clear opportunity by the exercise of proper care to avoid injuring another, must do so, not-

withstanding the latter has placed himself in such situation of danger by his own negligence. If therefore you should find from the evidence that the motorman of defendant's car which collided with the automobile, *saw or by the exercise of reasonable care and prudence should have seen the situation in which plaintiff was before the collision*, and had the opportunity by the exercise of proper care to avoid the collision and avoid injuring the plaintiff and failed to exercise such care or to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable and your verdict must be for the plaintiff."

In passing upon the correctness of this, the supreme court, through Mr. Justice Sloss, said: "This instruction is manifestly erroneous, in so far as it attempts to apply the last clear chance doctrine to a defendant who is not actually aware of the fact that plaintiff has negligently put himself in a position of danger. The italicized portion of the quotation declares a proposition that has been repeatedly repudiated by the decisions of this court. In *Herbert v. Southern Pacific Co.*, 121 Cal. 227, [53 Pac. 651], the court said that the liability under the doctrine in question 'is based upon the fact that defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule a defendant is not liable because he ought to have known'. The same views are expressed in *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656, [62 Pac. 308, 64 Pac. 993], and *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 18, [84 Pac. 420]. (See, also, *Esrey v. Southern Pacific Co.*, 103 Cal. 541, [37 Pac. 500])." The same rule was recognized by this court in *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 206, [93 Pac. 1049].)

But there is another objection to the instruction which we regard as insuperable.

Plaintiff, as we have seen, based his cause of action upon the negligence of defendant in furnishing defective brakes as well as upon the said carelessness and indifference of the motorman, and in the brief here respondent argues that the verdict may be sustained upon either ground. We must assume that the same argument was made to the jury, and

they may have adopted the theory that the negligence of defendant consisted in its failure "to equip the said car with proper or adequate brakes." Having taken this position, the jury may have concluded that if the car had been properly equipped with brakes it would have been stopped in time and the accident avoided. They would then apply said instruction to that contingency and necessarily reach the conclusion that though the child's mother was guilty of negligence that contributed directly to the injury, yet, since defendant, if it had furnished suitable brakes, might have avoided the accident, plaintiff was entitled to recover. This would be, of course, to set at naught and completely nullify the doctrine of contributory negligence. It would be in effect that the prior negligence of defendant, if contributing to the accident, would render defendant liable notwithstanding the succeeding negligence of plaintiff which contributed directly and proximately to the injury. In other words, contributory negligence would be entirely eliminated from the case. We cannot say that the jury did not make this erroneous and prejudicial application of said instruction, although we do not agree with respondent that the verdict can be justified on the ground of defective brakes. As we read the record, the evidence all shows that there was no negligence in that respect. There is much positive testimony similar to that of the witness, Robert N. Richardson, who declared: "I inspected that car that morning before it went out, and it was in good condition. The brakes were all right. I inspected that same car again the next morning and I found the brakes in good condition." There is no evidence to the contrary and the only reasonable inference is that the brakes worked properly but, unfortunately, they were not operated in time.

We think, therefore, that the court should have given this instruction proposed by defendant: "I instruct you that there is no evidence in this case to the effect that the brakes in defendant's car were inadequate or that defendant was negligent in respect to the braking equipment of said car or the condition thereof."

We find no other error in the record.

As to the amount of the verdict, we feel satisfied it is not excessive.

But, for the reasons stated, we are satisfied the defendant is entitled to a new trial and the judgment and order are therefore, reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1163. Third Appellate District.—November 25, 1913.]

LOYALTON ELECTRIC LIGHT COMPANY (a Corporation), Appellant, v. CALIFORNIA PINE BOX AND LUMBER COMPANY (a Corporation), Respondent.

CONTRACT TO FURNISH REFUSE OF FACTORY FOR FUEL—ACTION FOR BREACH—EVIDENCE.—In this action by an electric company against the owner of a box factory for damages because of an alleged breach of a contract to furnish the electric company for fuel purposes the excess of the refuse of the box factory not needed by it for steam generating purposes, the finding that the defendant did not refuse to permit the plaintiff to use such refuse is supported by the evidence.

ID.—CONSTRUCTION OF CONTRACT—OPERATION OF FACTORY.—Such contract does not obligate the owner of the box factory to operate it merely for the sake of producing refuse which the electric company may use for fuel.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

W. E. F. Deal, and Curler & Martinson, for Appellant.

Pillsbury, Madison & Sutro, for Respondent.

BURNETT, J.—The appeal is from the judgment and order denying a motion for a new trial. On April 20, 1904, appellant's assignor was engaged in operating an electric lighting plant and respondent was operating a box factory at Loyalton, in Sierra County. The power house for both plants was the same and was owned by respondent and con-

tained the dynamo and engine of appellant. On that date the parties entered into a written contract whereby it was agreed that respondent should keep employed a fireman for the purpose of keeping up steam in the boilers in the power house during the hours when the box factory should not and the lighting plant should be in operation and appellant was to be allowed the use of so much of the steam as might be necessary for the operation of its plant. Additional help, if needed, was to be employed by appellant. The right was accorded appellant to use the room in which was situated its dynamo and engine and to erect and maintain on and over the land owned or occupied by respondent such poles as might be necessary for the proper support and conduct of its wires used in connection with its lighting plant. Appellant agreed to furnish respondent with such electric lights as it might require in its factories, power house and other buildings, yards, and premises at Loyaltan, not to exceed, however, in all two hundred lights for the price of ten cents per month for each of said lights. The main controversy, though, is over the following provision in said agreement: "The second party" (appellant) "shall have the right to use for fuel any refuse of the box factory which the first party" (respondent) "may not require for generating steam for its own purpose, and any additional fuel which may be required for the purpose of generating steam for the use of the second party shall be supplied by the second party at its own expense."

An alleged violation of this provision by respondent is the basis for the action, plaintiff alleging: "That on or about the first day of September, A. D. 1904, the defendant, in violation of the said contract, refused to permit plaintiff to use the refuse of the box factory for the purpose of generating steam, and ever since said day, and up to the first day of July, A. D. 1908, has sold and disposed of all of the refuse of said box factory not required by it for generating steam for its own purposes. . . . That by reason of the said violation of said contract by defendant, plaintiff has been damaged in the sum of seven thousand, two hundred dollars."

This was positively denied by respondent and the court found against appellant. The vital point in the case involves the sufficiency of the evidence to support this finding.

And as to this, the contention is confined to the refusal to furnish block-wood, it being claimed as a part of the refuse.

Respondent points out in the record certain testimony which, it is contended, is amply sufficient to support the finding of the court and with this contention we agree.

C. E. Horton and R. W. Bender were the two witnesses called by appellant to prove the alleged refusal of respondent to comply with its agreement. The former testified that he was manager of respondent's plant from the fall of 1904 until December 30, 1906, and during that period he was there about three-fourths of the time. He was asked by appellant's counsel this question: "What, if any, objection was made at any time while you were there to the use of the blocks as well as of sawdust and shavings, by the defendant in this action or any of its officers?" and he answered: "There was no objection made by any one at all at any time." The witness repeated the declaration that there was no objection made by defendant or any of its officers during the entire period to the use by appellant of any of the refuse not needed by respondent.

The other witness, Mr. Bender, did testify that he had an altercation on several occasions with respondent's engineer about the use of the fuel, that the latter had refused to let him have it after a certain time at night, saying he had to keep up fire for the steam and that they would run short if they let the witness have the fuel. There is no evidence that the engineer made any misstatement as to the necessities of respondent in that regard. To the contrary, our attention is called to the following testimony of the witness: "Mr. Madison. Q. You heard Mr. Horton's testimony here this morning, did you, to the effect that the plaintiff in this case never was refused block-wood? A. Yes sir. Q. Do you mean to contradict him on that point? A. No sir, I do not; but when I made the statement that I had been refused the use of the blocks, it was the engineer's refusal to give them to me; and also when the engineer would refuse to give them to me, I called on the bookkeeper, and he said, yes, that they didn't have enough to run on and I couldn't use them. Q. And he was actually using them for generating the steam? A. Yes, sir; he was using the blocks and sawdust both. Q. And that is what he refused you? A. Yes sir. Q. And

that is all he refused you? Yes, and I had to go out and get my own wood, my own fuel."

Mr. Horton also explained the controversy with the engineer by stating that he found out by investigation that the engineer wanted the blocks "for work on the following day to make steam until he could make more blocks and fuel for the use of the box factory." Mr. Horton further testified that "There was no objection by any one to using the blocks. It was a shaving bin and it was in the fire room in front of the boiler, and when the factory run right through the day, and the engineer said there wouldn't be enough shavings and saw dust to start the box factory the next morning, until he could get enough shavings to keep running during the day he at times would allow them to use the shavings out of the bin; but no one ever refused to allow the blocks to be used."

He further testified, when recalled, that the only complaint ever made by appellant was that it couldn't get the blocks from the "Roberts block-house after the lease running from Roberts Company to the California Pine Box Company had ceased and the Roberts people had taken the property back again and then they refused to let the electric light company have the blocks."

It furthermore appears that respondent was not chargeable with any act or omission of the said Roberts Company and that appellant was in the habit of obtaining its block-wood from the Roberts block-house, as the arrangements for obtaining the same were more convenient than from respondent's block-house.

As to the sale by respondent of block-wood it was declared by Mr. Morton that this was done only as to the surplus after the requirements of appellant and respondent were met.

We deem it unnecessary to go further into this branch of the subject. After reading the entire record we are satisfied that the court's conclusion is a rational inference from the evidence and, therefore, supported within the contemplation of law.

Indeed, about the only serious controversy is as to the period when respondent's plant was not in operation. It seems that it was shut down early in 1907 and it so remained for two years. As to this we are in entire accord with re-

spondent's views as follows: "That the contract did not obligate the respondent to operate its box factory merely for the sake of producing refuse which appellant might use, if it wanted to, would seem to be clear. The contract, neither expressly nor impliedly, contains any language imposing such an obligation upon the respondent, nor indeed any language which shows that the parties even expected such operation to be continuous, although expressions showing their expectation to that effect, if there had been any, would not be the equivalent of a covenant."

The learned trial judge, it may be stated, so construed the contract in another action between the same parties covering a later period and the judgment was affirmed by the district court of appeal for the first district, the opinion being written by the late Mr. Justice Hall and reported in 22 Cal. App. 75, [133 Pac. 323]. Therein it was said: "The theory of appellant is that under the contract respondent was and is obliged to operate its box factory in order to produce refuse of the box factory, to the end that appellant may use for fuel any such refuse as respondent may not require for generating steam for its own purposes. This theory is entirely untenable." We think the reasons assigned by said court for its conclusion are sound.

Appellant urges that this construction makes the contract quite unequal and results in great detriment to its interests. From the record, however, we cannot estimate the relative value of the various covenants of the contract nor determine the diminution of the expense for the lights caused by the inaction of the box factory, nor, indeed, can we say that appellant was required to furnish respondent with any lights while its factory was not in operation. These considerations are, in fact, not before us. We are dealing simply with what was at issue in the case at bar.

We think the judgment and order should be affirmed and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1208. Third Appellate District.—November 25, 1913.]

O. D. JACOBY, Respondent, v. WILBUR S. PECK et al.,
Appellants.

ACTION FOR INSTALLMENTS OF RENT—EXPRESS LIMITATION AS TO QUESTIONS DETERMINED—JUDGMENT AS BAR TO SUBSEQUENT ACTION.—

Where, in an action to recover installments of money in the nature of rent, the court determines the cause with reference to the installments that were matured when the complaint was filed and expressly declines to find as to any subsequent installment, the judgment is not a bar to a subsequent action for later installments.

ID.—CONCLUSIVENESS OF JUDGMENT—MATTERS THAT MIGHT HAVE BEEN LITIGATED.—The rule that a judgment is final and conclusive between the parties not only as to matters actually determined, but as to every matter which the parties might have litigated and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, cannot properly be invoked as to an issue which affirmatively appears not to have been determined by the judgment; as to that issue there is no judgment, and necessarily there can be no estoppel by something that does not exist.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Henry G. W. Dinkelspiel, and Daniel A. Ryan, for Appellants.

Chickering & Gregory, for Respondent.

BURNETT, J.—There were two appeals in this case, one by plaintiff and the other by defendants. The first was considered by this court in an opinion filed November 7 last and reported *ante*, p. 183, [137 Pac. 264], to which reference may be had for a statement of the nature of the action. Since that decision was rendered the appeal by defendants has been transferred to this court by the supreme court.

The contention of appellants here is that they should have judgment for the reason that the issues in this action were determined, or could have been determined, in a prior action

that was tried between the same parties for the same amount. This prior action was properly pleaded in bar and as to it the court found as follows: "That on August 21, 1905, said plaintiff, O. D. Jacoby, commenced an action in said superior court, in and for the city and county of San Francisco, against said Wilbur S. Peck, Herbert R. Peck and W. S. Peck, Jr., copartners doing business as W. S. Peck & Co., and said James J. Gildea and the J. J. Gildea Co., a corporation, praying judgment against said defendants for the sum of \$5942.50, upon the same contract upon which this action was brought, and which is the same amount claimed in and by this action.

"That the issues in said action were the same as in this action; *that in and by said action all the issues embraced in this action were adjudged and determined, save and excepting the issue as to what, if any, amount became due said plaintiff on and after the first day of September, 1905 by way and by reason of said bonus referred to in said contract*; that in and by said judgment, pursuant to the findings made and filed in said action, it was adjudicated . . . That plaintiff was entitled to recover nothing from defendants save and excepting the sum of \$450.00, being the installment which became due on the first days of June, July and August, 1905.

"That the findings in said action were made and filed on the 18th day of June, 1909, *nunc pro tunc* as of November 28, 1908, and judgment therein was entered in favor of the plaintiff and against the defendants for said sum of \$450.00, together with interest.

"That no appeal was taken from said judgment and said judgment has never been vacated or set aside save and excepting as against" the Pecks and W. S. Peck & Co., "and not as to any other of the said defendants, said judgment has been vacated and set aside by the order of said court; that said judgment has become final and is now in full force and effect against said James J. Gildea and said J. J. Gildea Co., a corporation."

We have italicised the portion of said finding to which especial attention will be directed.

The said action having been begun on August 21, 1905, it is of course, manifest that no cause of action existed at that time in favor of plaintiff for the said later installments, at

least, unless plaintiff had exercised the option and made the demand provided in said contract as a condition precedent for the maturity of the whole obligation of the said party of the second part. In view of the finding of the court, however, we must assume that said later installments were not then due.

It is true, though, that, at the time of the trial, they had "long since" become payable and a supplemental complaint might have been filed covering these installments and a disposition made of the whole controversy in the one action. This course, however, was not pursued, and it expressly appears, as already seen, that the court determined the cause upon its merits with reference to the installments that had matured when the said complaint was filed, and the court expressly declined to find as to any subsequent installment.

We do not understand that such judgment would be a bar to the maintenance of a cause of action accruing subsequent to said August 21, 1905.

The conditions or elements that render the prior judgment a bar to a subsequent action are provided in section 1908 of the Code of Civil Procedure, which as far as involved herein, is as follows: "The effect of a judgment or final order in an action or special proceeding before a court or judge of the state, or of the United States having jurisdiction to pronounce the judgment or order, is as follows: . . . 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding."

The only matter "directly adjudged" in the case before us is the indebtedness existing on said August 21, 1905, and as to that the judgment would, of course, constitute a bar, but it did and could not affect any subsequent indebtedness between the same parties.

The findings of the court leave no doubt as to what was "directly adjudged," but an additional assurance has been furnished by the rule prescribed in section 1911 of the Code of Civil Procedure as follows: "That only is deemed to have

been adjudged in a former judgment, which appears upon its face to have been so adjudged or which was actually and necessarily included therein or necessary thereto."

Probably no such direction is needed in a case like this where the judgment itself is explicit as to what was determined, but in many instances there is less degree of certitude as to what was "directly adjudged." And it will be found on examination that, generally, it is such cases that have given rise to the enunciation and application of the rule of evidence contended for by appellants. Here, as we have seen, there is an express declaration of what was adjudged. Besides, ignoring that declaration and keeping in mind the principle that we must not presume a forfeiture or default and that a judgment, it not otherwise appearing, determines the facts as they exist at the time of the filing of the complaint, an inspection of the judgment-roll leads to the conclusion that only the installments made payable by the contract, prior to September 1, 1905, were "actually and necessarily included" in said judgment and that the court was justified in holding that the cause of action as to the subsequent installments had not then matured.

But even if the court erred and should have determined the whole issue, while its failure to do so would be subject to revision and correction by the regular statutory methods, it would not affect the question involved herein.

What was actually adjudged—not what should have been adjudged—is the vital consideration here. "The judgment in such a case does not become an estoppel as to all matters which might have been litigated therein, but only as to such as were actually litigated, and which were necessary to be determined by the court before rendering its judgment upon the demand or the defense." (*Lillis v. Emigrant Ditch Co.*, 95 Cal. 561, [30 Pac. 1108].)

Appellants have made a misapplication and have misconstrued certain language of some of the decisions. They quote to the effect that "A judgment is final and conclusive between the parties not only as to matters actually determined, but as to every matter which the parties might have litigated and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action." This statement cannot properly be invoked

as to an issue which affirmatively appears not to have been determined by the judgment. As to that issue there is no judgment and necessarily there can be no estoppel by something that does not exist. If appellants' contention as to issues not determined be sound, then we must read the statute as providing that "the judgment is in respect to the matter directly adjudged and *as to the matter that ought to have been directly adjudged* conclusive between the parties," etc.

The cases cited by appellants present a situation entirely different from that before us, as will readily be appreciated. *Baker v. Bartol*, 6 Cal. 483, seems not to be in point. The question there was one of pleading and of the sufficiency of the evidence to support the judgment.

In *Gray v. Dougherty*, 25 Cal. 272, the doctrine contended for by appellants is qualified as follows: "It must appear, however, that the subject matter or question was not only the same, but that it was submitted on its merits and actually passed upon by the court; for if the trial went off on a technical defect, or because the cause of action had not yet accrued, or because of a temporary disability of the plaintiff to sue, or the like, the judgment could not be a bar to a future action. (Greenleaf on Evidence, sec. 530.) These facts may be ascertained by an inspection of the judgment-roll in the former suit; and if that fails to disclose all the facts necessary to a complete determination of the question, a resort may be had to extrinsic evidence."

In *Phelan v. Gardner*, 43 Cal. 306, it was held that the judgment-roll in the former action was properly excluded and that an unnecessary finding therein was not conclusive in a subsequent action.

The question decided in *Parnell v. Hahn*, 61 Cal. 131, was that the validity and legal effect of a contract of sale put in issue and determined in a former action could not be subsequently litigated by the same parties in another action.

In *Hardy v. Hardy*, 97 Cal. 125, [31 Pac. 906], it seems that a demurrer had been sustained to the complaint on the ground that it did not state facts sufficient to constitute a cause of action and judgment was entered against the plaintiff. Thereafter another action was brought between the same parties in which the same facts were alleged in the complaint with an

additional immaterial averment and it was properly held that the former judgment was a bar to the second action. In other words, it had already been adjudged that essentially the same facts did not entitle the plaintiff to any relief, and for the court to have held otherwise in the second action would have been to nullify the former judgment.

In *Crew v. Pratt*, 119 Cal. 139, [51 Pac. 38], it was held that "a decree distributing the estate to trustees named in the will of the decedent which has become final by failure to appeal therefrom, though erroneous, is a conclusive adjudication of the validity of the trust." In other words, it was decided that the validity of the trust "was actually and necessarily included" in and necessary to the determination of said decree.

How unlike the present are all these cases must be apparent at a glance.

The case here, in principle and on its facts, is more nearly analogous to *McDougal v. Downey*, 45 Cal. 165; *Thrift v. Delaney*, 69 Cal. 188, [10 Pac. 475], and *Shanklin v. Gray*, 111 Cal. 88, [43 Pac. 399].

In the first it was held that "when a mortgage is given to secure money to fall due in several installments from year to year, a judgment enforcing the lien of the mortgage for one installment is not a bar to another action to enforce the lien of the mortgage for another installment subsequently falling due."

In the Thrift case it was held that a judgment in an action of ejectment was not a bar to a subsequent action to recover possession of the property where the plaintiff relied upon a new title, the court holding that the former judgment was conclusive only as to the matters *put in issue and passed on* in the action.

In the Shanklin case it was held that "neither the recovery of a judgment nor the pendency of an action for a past delinquency is a bar to a subsequent action for a delinquency occurring after the *commencement* of the prior action."

We think there is no merit in the appeal and the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1189. First Appellate District.—November 26, 1913.]

THIRD STREET IMPROVEMENT COMPANY (a Corporation), Appellant, v. ROBERT MCLELLAND et al., Respondents.

ACTION FOR MONEY HAD AND RECEIVED—WRITTEN SETTLEMENT—ORAL EVIDENCE OF OMITTED ITEM.—Where it is shown, in an action for money had and received by the defendants for the use and benefit of the plaintiff, that the parties made a settlement in writing, parol evidence is not admissible that prior to the written settlement the plaintiff paid the defendants five hundred dollars which, by inadvertence, was not entered in the books of the plaintiff, and consequently was not taken into consideration in the negotiations for settlement, nor had the plaintiff received credit for the same.

ID.—ORAL NEGOTIATIONS —MERGER IN WRITTEN SETTLEMENT.—The moment it appeared that the parties had stated their account in writing, a presumption arose that the payment of the five hundred dollars made prior thereto, together with all previous oral negotiations, were merged in the written agreement.

ID.—MISTAKE IN SETTLEMENT — AMENDMENT OF COMPLAINT SO AS TO HAVE CONTRACT REFORMED.—But it was reversible error to refuse the plaintiff leave to amend its complaint by adding a count thereto in which to allege the mistake of fact in the agreement of settlement, and praying for the reformation of the contract and the recovery of the five hundred dollars overpaid.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

Frohman & Jacobs, for Appellant.

Peter A. Breen, and Arthur W. Perry, for Respondents.

KERRIGAN, J.—This is an appeal from a judgment of nonsuit. The action was for money had and received by the defendants for the use and benefit of the plaintiff. The answers of the defendants denied the receipt of the money.

Upon the trial of the case the secretary of the corporation plaintiff testified that the defendants, as copartners, erected a

building for the plaintiff in San Francisco, and that at or about the time of the completion of the building there was an agreement of settlement in writing between the parties. This agreement was introduced in evidence and consisted of an itemization of sums paid by plaintiff to the defendants and an agreement as to the mode of payment of the balance still remaining due, the amount of which was found and fixed by the writing. The witness testified that the balance so agreed upon was subsequently paid. He also testified that about four months prior to entering into the written settlement the plaintiff paid to the defendants the sum of five hundred dollars which, by inadvertence, was not entered in the books of the plaintiff, and consequently was not taken into consideration in the negotiations for settlement, nor had the plaintiff received credit for the same. This testimony was objected to by the defendants, but was admitted by the court subject to a later ruling; and upon the plaintiff closing its case the defendants renewed their objection to and moved to strike out all testimony relating to the payment of this five hundred dollars upon the ground that it was incompetent, irrelevant, and immaterial; that the said payment was made prior to the making of the account stated; that it was an attempt to correct the written account stated by parol in the absence of proper pleading for that purpose; and that the account stated was conclusive upon all matters embraced within it, and moved for a nonsuit upon the ground that plaintiff had failed to prove the allegations of its complaint. The court granted the motion to strike out and also the motion for a nonsuit, and as before stated, it is from the judgment entered thereupon that plaintiff appeals.

After argument of the motion to strike out and for an order of nonsuit the plaintiff asked leave to amend its complaint by adding a count thereto in which it would allege the mistake of fact in the agreement of settlement, and pray that the contract be reformed, and for the recovery of the five hundred dollars overpaid. This motion was also denied.

In support of its appeal plaintiff claims that the court erred in striking out the testimony admitted subject to the objection; that it also erred in refusing permission to amend the complaint, as also in its order granting defendant's motion for nonsuit.

Under the issues framed by the pleadings the testimony stricken out by the court was clearly inadmissible for the reasons stated in the objection thereto. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

"1. Where a mistake or imperfection of the writing is put in issue by the pleadings." (Code Civ. Proc., sec. 1856.)

"The execution of a contract in writing whether the law requires it to be written or not, supersedes all negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." (Civ. Code, sec. 1625.)

A contract which does not express the intention of the parties cannot be enforced according to their intention without first reforming it to make it express such intention. (*Kittle et al. v. Duncan*, 46 Cal. 342, 346; *Irving v. Cunningham*, 66 Cal. 15, [14 Pac. 766].) The written contract must control as to all the terms expressed in it; and if there is any difference between it and the oral contract the written document must be referred to in order to preserve the rights of the parties. (*Linton v. Unexcelled Fireworks Co.*, 128 N. Y. 672, [28 N. E. 580].)

In the case of *Bush v. Tilley*, 49 Barb. (N. Y.) 599, the rule is thus stated: "If the alleged previous oral arrangement is declared upon as the subsisting agreement . . . the subsequent agreement duly executed, the moment it is presented in evidence, destroys the oral one and takes away its character as an agreement entirely."

In the case at bar, the moment it appeared that the parties had stated their account in writing, a presumption arose that the payment of the five hundred dollars made prior thereto, together with all previous oral negotiations, were merged in the written agreement.

Coming now to the main point in the case, we think the court, in the exercise of a sound discretion, should have permitted the proposed amendment and that its denial must be regarded as an abuse of discretion. The case for the plain-

tiff was very brief; the defendants did not claim to be taken by surprise, or ask for a postponement, or the imposition of terms. Nor does it appear that if the account were ordered corrected and reformed a complete readjustment or a wholly new settlement would be necessary. Apparently all that would follow if plaintiff established its case would be to give it judgment for the five hundred dollars sued for. The defendants seemed to rely wholly on the theory that the proposed amendment would wholly change the cause of action, and that the trial court therefore was without any power to permit it. We do not think this is the correct view. Plaintiff in the proposed second count of the complaint would be merely alleging in effect the facts of the case as disclosed by the evidence, which facts, if the court found them to be true, would entitle the plaintiff to recover what it sought to obtain by the original complaint, i. e., the five hundred dollars overpaid the defendants by reason of a mistake of fact. In both counts the cause of action would be the same, viz.: the recovery of the five hundred dollars paid by the plaintiff to the defendants through an oversight or mistake. The allowance of the amendment would not change the cause of action, but would merely permit the pleading of the appropriate allegations—which may be done. (*Frost v. Witter*, 132 Cal. 421, [84 Am. St. Rep. 53, 64 Pac. 705]; *Born v. Castle*, 22 Cal. App. 282, [134 Pac. 347].) The purpose of the law allowing amendments is of course to permit the correction of errors and omissions on the part of a pleader; and, since it cannot be successfully denied that the plaintiff, in its original complaint, could have properly sought a reformation of the contract, and, if reformed, a recovery thereon as reformed (34 Cyc. 994, 999; 24 Am. & Eng. Ency. of Law, p. 615; 4 Pomerooy's Equity Jurisprudence, 1376; *Walsh v. McKeen*, 75 Cal. 519, [17 Pac. 673]); and as it appears also that the defendants would in no way have been prejudiced by permitting the amendment in presenting their defense, it follows, it seems to us, that the court erred in disallowing the proposed amendment.

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 26, 1913, and a petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on January 23, 1914.

[Civ. No. 1398. Second Appellate District.—November 26, 1913.]

IDA R. BECKETT, Respondent, v. Z. B. STUART,
Appellant.

APPEAL—FAILURE OF RESPONDENT TO FILE BRIEF—ACCEPTANCE OF RECORD AS PRESENTED BY APPELLANT.—Where an appeal is taken under section 953a of the Code of Civil Procedure, and the appellant, pursuant to the requirements of section 953c of the Code of Civil Procedure, prints in his brief such parts of the record as he deems pertinent to the questions involved on the appeal, but the respondent files no brief and raises no question as to the correctness or sufficiency of the record as presented by the appellant, the appellate court will accept the evidence as set out in the appellant's brief as true and correct.

ID.—CONVERSION—COLLECTION OF NOTE AND APPROPRIATION OF PROCEEDS—DEFENSE—FINDINGS.—In an action to recover the amount of a note and mortgage intrusted to the defendant for collection, and alleged to have been collected and fraudulently appropriated by him to his own use, the failure to find on an issue tendered by the answer and constituting a defense to the action, that the plaintiff, for a valuable consideration, sold and transferred the note to the defendant, is ground for a reversal of a judgment for the plaintiff.

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Rives, Judge.

The facts are stated in the opinion of the court.

Z. B. Stuart, and S. Monteleone, for Appellant.

Ben S. Hunter, for Respondent.

SHAW, J.—In this action plaintiff alleged that she intrusted to defendant for the purpose of collection a certain note and mortgage then owned by her, executed by one Juliet

Burns, upon which there was due and payable the sum of one thousand five hundred dollars; that on December 30, 1909, said Burns paid the same to defendant who appropriated it to his own use and refused to pay the same or any part thereof to plaintiff. These allegations, other than the refusal to pay, are denied by the answer, which further alleged that in December, 1909, said Burns paid to defendant the sum of one thousand five hundred dollars for the use of one Sarnighausen, who on December 22, 1909, made and delivered to plaintiff his note therefor, which said sum was at the time a loan made by plaintiff to Sarnighausen of the funds then belonging to her in the hands of said Burns; that on July 12, 1910, for a valuable consideration, plaintiff sold and transferred to defendant said note so made to her by Sarnighausen.

The court found that plaintiff intrusted to defendant the collection of the note and mortgage made and executed by Burns, as alleged, and that he collected and fraudulently appropriated the same to his own use.

Judgment went for plaintiff, from which defendant appeals upon a transcript prepared in accordance with the provisions of section 953a of the Code of Civil Procedure. Section 953c of the Code of Civil Procedure, provides that where this mode of appeal is adopted by an appellant the parties must print in their briefs such portion of the record as they desire to call to the attention of the court. In the case of *Wills v. Woolner*, 21 Cal. App. 528, [132 Pac. 283], which was an appeal taken under said section 953a, this court said: "Our attention is not called in the briefs to any evidence, or reference thereto, given upon this subject, and the court must not be expected to search through a voluminous record in an effort to discover the existence of evidence touching the question." Appellant has filed a brief, printing therein such parts of the record as he deems pertinent to the questions involved on the appeal, but respondent has filed no brief nor raised any question as to the correctness or sufficiency of the record as presented by appellant. In the absence thereof, we accept the evidence as set out in appellant's brief as true and correct.

It appears that in December, 1909, plaintiff loaned to Juliet Burns the sum of one thousand five hundred dollars for a term of one year, taking her note therefor secured by a mortgage. A few days thereafter, and in the month of December, 1909,

Burns paid the amount of said note, and said sum of one thousand five hundred dollars so paid by her was loaned to Sarnighausen, who made and executed his note to plaintiff. Plaintiff knew of the payment of the Burns note and knew that the proceeds thereof had been loaned to Sarnighausen who had made his note therefor payable to her, and through defendant made payments of interest thereon. On July 12, 1910, she indorsed upon the back of the Sarnighausen note the following: "For value received, I hereby sell and assign the within note to Z. B. Stuart. Dated this 12th day of July, 1910;" and on the same day executed an instrument in writing, reciting that she had for a valuable consideration sold, assigned, and delivered to Stuart the promissory note dated December 22, 1909, for the sum of one thousand five hundred dollars, payable to her one year after date, the recited consideration therefor being legal services rendered and to be rendered by Stuart in a case pending in the superior court wherein she was named as co-respondent, as well as for other legal services, and the cost and expenses thereof, which assignment, it is stated, was made without recourse and with the knowledge on the part of plaintiff that the collection thereof was uncertain. Plaintiff called as a witness one E. K. Isaacs to whom was shown said written transfer and asked whether the signature thereto was in the same handwriting as the signatures upon other papers exhibited to the witness, in reply to which the witness stated that the signature to said document was in a different handwriting from the signatures to the other documents so exhibited to him. What those papers were, or whether or not the signatures thereto were the genuine signatures of plaintiff is not disclosed by the record. Although plaintiff took the stand as a witness, she did not deny making the indorsement on the note or the execution of the instrument purporting to assign and transfer the note, or make any statement tending in the slightest degree to show these documents to be other than what they purported to be. In the absence of such evidence, we must construe the documents in accordance with the plain import of the language therein. If as alleged in the answer plaintiff, prior to the bringing of the suit, to wit: on July 12, 1910, for a valuable consideration, sold and delivered said promissory note to defendant, such fact would constitute a sufficient defense to the action.

Moreover, the affirmative allegation of the answer that on July 12, 1910, plaintiff, for a valuable consideration, sold and transferred the note to defendant, which as such constituted a defense, tendered a material issue, as to which defendant was entitled to a finding by the court. For this reason, if for no other, the judgment should be reversed; and it is so ordered.

Conrey, P. J., and James, J., concurred.

[Crim. No. 469. First Appellate District.—November 28, 1913.]

THE PEOPLE, Respondent, v. ALBERTO PROFUMO,
Appellant.

CRIMINAL LAW—DYING DECLARATION—INSTRUCTION GIVING JURY LIBERTY TO DISREGARD.—An instruction in a homicide case, upon the subject of dying declarations: "Whether the declaration was in fact made under a sense of impending death is a question of fact which most materially affects the question of its credibility, and the determination of the court thereon is not conclusive upon the jury. They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was in *extremis*, and fully convinced of that fact when making the declaration, and are at liberty to disregard it if not satisfied that it was made under a sense of 'impending death'—while it correctly commits to the jury the final determination as to whether the declaration was made while the declarant was in *extremis*, and was conscious of the fact of his condition, leaves the jury "at liberty" to regard or disregard the declaration, although it has not been proved to their satisfaction that it was made under a sense of impending death.

ID.—INSTRUCTION AS TO DYING DECLARATIONS—WAIVER BY FAILURE TO REQUEST MORE SPECIFIC CHARGE.—This error in such instruction is not waived by the failure of the defendant to request a more specific instruction upon the subject of dying declarations. Where a general instruction is given by the court which is correct as far as it goes, but is merely deficient by reason of its generality, the defendant is bound to request that the charge be made more specific, and in the absence of such request is held to have waived his objection to the instruction; but to hold that an error of an instruction, which merely informs the jury that they are at liberty not to do that which under given conditions they are bound not to do, must be corrected by the defendant at the moment of its commission, under penalty

of waiving his right to object to it upon appeal, would be to carry the rule of waiver entirely too far.

ID.—ERROR IN INSTRUCTION AS TO DYING DECLARATION—WHEN HARMLESS.—The misdirection to the jury in such instruction is not such prejudicial error as to have resulted in a miscarriage of justice and require a reversal, where the appellate court, pursuant to its duty under section 4½ of article VI of the constitution, makes an examination of the entire cause, including the evidence, to determine whether the error was prejudicial, and finds that undisputed evidence shows beyond a reasonable doubt and to a moral certainty that the alleged dying declaration of the decedent was in fact so, and was made under a sense of impending death, and that the jury must have so found from the affirmative and unquestioned proofs before them.

ID.—DYING DECLARATION—WHAT CONSTITUTES—ADMISSIBILITY IN EVIDENCE.—A dying declaration is admissible in evidence only when, in the first instance, the court is reasonably satisfied by evidence *alunde* that it was made under a sense of impending death; and, having been so admitted by the court, is competent evidence to be considered by the jury only when they shall also have first satisfied themselves beyond a reasonable doubt that it was made by the declarant as a dying person and under a sense of impending death.

ID.—MANSLAUGHTER—REFUSAL OF INSTRUCTIONS DEFINING.—The failure of the court in a homicide case to instruct the jury on the subject of manslaughter is not reversible error, when the elements of manslaughter are not reasonably deducible from the evidence.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

Thomas V. Eddy, and Philip C. Boardman, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of the defendant of murder of the second degree and from an order denying his motion for a new trial.

The first point urged by the appellant is that the court erred in giving to the jury the following instruction upon the subject of dying declarations: "Whether the declaration was in fact made under a sense of impending death is a question of fact which most materially affects the question of its credibility,

and the determination of the court thereon is not conclusive upon the jury. They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was *in extremis*, and fully convinced of that fact when making the declaration, and are *at liberty* to disregard it if not satisfied that it was made under a sense of impending death." The vice which the appellant points out as existing in this instruction is that, while it correctly commits to the jury the final determination as to whether the alleged dying declaration was made while the declarant was *in extremis*, and was conscious of the fact of his condition, it leaves the jury "at liberty" to regard or disregard the declaration although it has not been proven to their satisfaction that it was made under a sense of impending death.

There would seem to be little doubt as to the correctness of this contention. A dying declaration is only admissible in evidence when, in the first instance, the court is reasonably satisfied by evidence *aliunde* that it was made under a sense of impending death; and, having been so admitted by the court, is only competent evidence to be considered by the jury when they shall also have first satisfied themselves beyond a reasonable doubt that it was made by the declarant as a dying person and under a sense of impending death. The rule on this subject is clearly set forth by Mr. Justice Angellotti in the case of *People v. Thomson*, 145 Cal. 717, 725, [79 Pac. 435], in the following words: "Inasmuch as the declaration of the decedent is competent evidence only when made under the sense of impending death and because it is so made, it would seem to logically follow that the jury could give it no consideration whatever unless they are satisfied that it was made by the deceased under such sense of impending death. It is a rule of evidence that such a declaration can be considered only in that event; and while the court must of necessity preliminarily determine the question of fact essential to the admission of the declaration in evidence, the rule of evidence still remains for the guidance of the jury; and as the jury must exercise their power of judgment of the effect of the evidence in subordination to the rules of evidence, it would seem to be proper to inform the jury of such rule and of their duties in regard thereto."

It is, however, contended by the respondent that the instruction under consideration is to be held to be a correct statement of the law because it was also taken bodily from another portion of the opinion of Mr. Justice Angellotti in the case above cited.

When the case of *People v. Thomson* is examined it will be found that the language of the decision which the trial court in the case at bar excerpted and adopted as its instruction, was used by the learned justice not in defining the duty of the jury in respect of their consideration of the declaration, but in defining the duty of the court in respect of the admission of the declaration in evidence in the first instance; and that the learned justice followed the general language which was adopted by the trial court in its instruction with a specific statement of the law governing the ultimate attitude of the jury toward dying declarations which has been above set forth but which the trial court entirely omitted from its instruction; nor was the error of such omission corrected or cured in any other portion of the instructions.

The respondent further contends that, conceding the error in the instructions complained of, the appellant is not entitled to a reversal therefor because it was his duty, if he desired a more specific instruction to the jury upon the subject of dying declarations, to have requested of the trial court the giving of such instruction, and that his failure to request a more specific instruction waives the failure to give it.

The cases relied upon by the respondent to support this contention do not go so far, but merely hold that where a general instruction is given by the court which is correct as far as it goes, but which is merely deficient by reason of its generality, the defendant is bound to request that the charge be made more specific, and in the absence of such request is held to have waived his objection to the instruction; but to hold that an error of an instruction, which merely informs the jury that they are at liberty not to do that which under given conditions they are bound not to do, must be corrected by the defendant at the moment of its commission, under penalty of waiving his right to object to it upon appeal, would be to carry the rule entirely too far. This is well illustrated in the present case, wherein the instructions given by the trial court

are sixty-two in number, extending over forty-eight pages of the typewritten transcript on appeal.

It is also contended that the instruction, even though error, is not such prejudicial error as should work a reversal of the judgment, for the reason, as counsel urges, that the dying declaration in question was not essential to the case for the people, and that there is ample evidence without it to support the verdict.

The record does not sustain this contention. The defendant was charged in the information with murder in the first degree. The facts upon proof of which the people depended to sustain this charge were these: The defendant and one Robert Schaffer went to the cabin of the decedent with intent to commit burglary. While there they were surprised in the act of rifling the cabin by its owner, who first saw Schaffer, and after demanding the reason of his presence there, fired a shot at him, wounding him in the leg; that almost immediately thereafter the decedent was fired upon and fatally wounded by the appellant who, at the time of the first shot, was in another room of the house. The only witnesses to the actual shooting were the decedent, Schaffer, and the defendant; and the only two witnesses as to the purpose for which the defendant and Schaffer went into the cabin of the decedent were themselves. On the day before the trial Schaffer was permitted to withdraw his plea of not guilty of murder in the first degree, and to enter a plea of guilty of burglary in the second degree. Thereafter and upon the trial Schaffer turned state's evidence, and testified that the purpose of the defendant and himself in going into the cabin of the decedent was to commit burglary, and that being there it was the defendant who fired the fatal shot. The defendant took the witness stand in his own behalf, and denied the truth of both of these statements, asserting that he had no criminal purpose in being at the cabin; that he was not in it at all; that he was unarmed; that he did not fire the fatal or any shot, and that it was Schaffer who fired the fatal shot.

It is plain from this recital of the facts immediately connected with the homicide that the dying declaration of the decedent, to the effect that it was the defendant and not Schaffer who did the shooting, was a very important if not vital element in the proof of the people's case; and the fact

that even with its aid the jury were only so far convinced of the defendant's guilt as to bring in a verdict of murder in the second degree renders it very probable that he would not have been convicted of even the lesser offense but for the dying declaration.

This being so it must be held that if the record discloses that there was any room for a reasonable doubt as to whether the dying declaration was made under those conditions which are an essential prerequisite to its admission in evidence at all, then the giving of this erroneous instruction by the court constituted such prejudicial error as to compel a reversal of the judgment.

It therefore becomes the duty of this court, under section 41½ of article VI of the constitution, to make an examination of the entire cause, including the evidence, in order to determine whether the error complained of has resulted in a miscarriage of justice.

Upon such examination of the evidence, and particularly that portion thereof which purports to lay the foundation for the admission in evidence of the dying declaration and for its consideration by the jury, we are clearly of the opinion that the undisputed evidence in this case shows beyond a reasonable doubt and to a moral certainty that the alleged dying declaration of the decedent was in fact so, and was made under a sense of impending death; and that the jury must have so found from the affirmative and unquestioned proofs before them. This being so, the jury would have been bound under their oath to admit this dying declaration to their consideration; and having done so they would be at liberty to regard or disregard it according to their views as to its credibility; and thus it follows that the giving of the instruction in question by the trial court, though a misdirection of the jury, was not under the circumstances of this case such a prejudicial error as to have resulted in a miscarriage of justice.

The appellant makes the further point that the court erred in failing to give to the jury an instruction on the subject of manslaughter. From the review of the evidence above given it will, however, appear that the elements involved in the crime of manslaughter were not reasonably deducible from the facts of this case, and hence that the court committed no reversible error in its failure to give such an instruction.

(*People v. Rogers*, 163 Cal. 476, [126 Pac. 143], and cases cited.)

The judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 311. Second Appellate District.—November 28, 1913.]

THE PEOPLE, Respondent, v. A. B. SMITH, Appellant.

CRIMINAL LAW—MISCONDUCT OF DISTRICT ATTORNEY—WHETHER PREJUDICIAL.—Where a district attorney by his conduct surrounds a case with an atmosphere of adverse comment, remark, and running argument throughout a trial, or takes unfair advantage of the defendant by intimating to the jury something that is either not true or not capable of being proved in the manner attempted, such misconduct may become such serious error that it may be presumed to have caused prejudice against the defendant and to have prevented him from having a fair trial. But an isolated and comparatively unimportant imprudence in conduct, such as smiling incredulously at the testimony of the defendant concerning his alleged ill treatment while under arrest, has no such consequences.

ID.—INCEST—SUFFICIENCY OF EVIDENCE—CORROBORATION OF TESTIMONY OF ACCOMPLICE.—In this prosecution of a man for incest there is sufficient evidence to corroborate the testimony of the accomplice, his daughter, and to justify the verdict of guilty; it being admitted by him, as well as shown by her testimony, that they occupied the same apartments at a hotel for several weeks, and there being evidence that he registered them at the hotel as husband and wife and introduced her to others as his wife.

APPEAL from a judgment of the Superior Court of San Diego County and from an order refusing a new trial. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

Ralph F. Twombly, and John D. Dawson, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant, having been convicted of the crime of incest, appeals from the judgment on the verdict, and from an order denying his motion for a new trial.

On behalf of appellant it is claimed that he was prejudiced by certain questions, insinuations and remarks by the district attorney, which occurred during the cross-examination of the defendant, all of which it is claimed caused passion and prejudice against the defendant in the minds of the jury. During said cross-examination the defendant had testified to the fact that while under arrest he was taken from the city jail and was kept for some time in the county hospital, and that he was filled full of whisky and questioned by a certain policeman. The alleged misconduct of the district attorney, if confirmed at all by the record, is covered by the following:

“Q. by District Attorney: They treated you pretty bad down there, did they, Mr. Smith?

“Defendant’s Attorney: If the court please, I object to this conduct on the part of counsel and assign it as error. It is not proper or ethical.

“District Attorney: I admit I should not smile, but some things are too funny.

“The Court: Counsel should not express their feelings that way. The jury will judge.

“District Attorney: I understand that, your honor. I don’t want the jury to convict anybody because I smile.”

It is possible that the manner of the district attorney, his tone of voice, and smile of incredulity were subject to criticism, and the judge was evidently of that opinion. But the incident standing alone is of minor importance and does not relate to a material matter, and cannot appropriately be magnified by imagining evil effects. The facts shown are not sufficient to raise a presumption that this imprudent conduct of the district attorney “caused passion and prejudice against this defendant in the minds of the jury.” Where a district attorney by his conduct surrounds a case with an atmosphere of adverse comment, remark, and running argument throughout a trial, or takes unfair advantage of the defendant by intimating to the jury something that is either not true or not capable of being proven in the manner attempted, such misconduct may become such serious error that it may be presumed to have caused prejudice against the defendant and to

have prevented him from having a fair trial. (*People v. Grider*, 13 Cal. App. 703, [110 Pac. 586]. But an isolated and comparatively unimportant imprudence in conduct has no such consequences.

The only other ground suggested on which a reversal of the judgment might be urged is that the verdict is based on the uncorroborated testimony of an admitted accomplice. It is admitted by the defendant, as well as shown by the testimony of his daughter (who was nineteen years old and a married woman), that during a period of several weeks they had occupied the same room at a hotel and had slept in the same bed. The defendant had registered them at the hotel as husband and wife and had introduced his daughter to others as his wife. These facts furnish ample legal corroboration and justify the verdict. The excuses offered by defendant for occupying the same room and bed with his daughter and her infant child, were for the jury to consider and no doubt were duly weighed and found wanting.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1415. Second Appellate District.—November 29, 1913.]

HAZEL M. KEATING, Plaintiff and Respondent, v. EDWARD KEATING, Defendant and Respondent; VINNETTE LOHMAN, Co-respondent and Appellant.

APPEAL—ORDER REFUSING NEW TRIAL—ABSENCE OF STATEMENT.—No error can be predicated upon the ruling of a trial court in denying a motion for a new trial, when no statement has been settled and allowed. And although the want of a settled statement may be due solely to an error of the court in refusing to allow the same, this cannot avail a party aggrieved, on appeal from such order, when upon the record nothing appears to show the alleged errors upon which the motion is based.

ID.—NOTICE OF REFUSAL OF NEW TRIAL—FAILURE TO SERVE—DEFICIENT RECORD.—If notice of the denial of an appellant's motion for a new trial is not served, and the record on appeal does not contain the papers specified in section 661 of the Code of Civil Procedure,

as required by section 952 of that code, the order denying the motion for a new trial must be affirmed.

ID.—DIVORCE—MOTION FOR NEW TRIAL—AGREEMENT TO PREPARE STATEMENT—DEFAULT IN PREPARING AND SERVING STATEMENT.—Where the co-respondent and the defendant in a divorce action agree that the defendant shall prepare a statement to be used by both on their respective motions for a new trial, but the plaintiff is not a party to the agreement and is served with the statement in support of the motion of the defendant alone, the co-respondent is not entitled to rely on the statement of the defendant. The failure of the defendant to carry out the agreement is no ground for relief from the co-respondent's default in preparing and serving a statement.

APPEAL from orders of the Superior Court of Los Angeles County made in the matter of applications for a new trial. George E. Church, Judge presiding.

The facts are stated in the opinion of the court.

Geo. L. Keefer, for Co-respondent and Appellant.

James P. Clark, J. Wiseman Macdonald, and Waldo M. York, for Respondents.

SHAW, J.—This was an action for divorce wherein the defendant, among other grounds therefor, was charged with committing adultery with Vinnette Lohman, who filed an answer denying the charge. The court found the fact as alleged, and on August 25, 1911, rendered a decree granting the divorce. On September 6th the co-respondent served and filed her notice of intention to move for a new trial upon the grounds of insufficiency of the evidence to justify the decision, errors in law occurring at the trial, and that the decision is against law, which motion it was stated in the notice would be made upon a statement of the case. On September 14th, and within the ten days allowed by law for the preparation of such statement, co-respondent procured from the judge of the court an order giving her an additional period of thirty days within which to prepare her statement on motion for new trial, to the making of which order plaintiff herein did not consent. The statement was not prepared within the extension of time so granted, and on October 16th co-respondent procured a second order extending the time for an additional

period of thirty days, to the making of which order plaintiff did not consent. While this order so made on October 16th was void, for the reason that the power of the court was exhausted in making the first order extending the time for a period of thirty days (Code Civ. Proc., sec. 1054; *Bunnel v. Stockton*, 83 Cal. 319, [23 Pac. 301]; *Gibson v. Superior Court*, 83 Cal. 643, [24 Pac. 152]), nevertheless, since the co-respondent did not prepare nor present such statement within the time so specified therein, or at all, the fact that the order made was in excess of the court's jurisdiction is of no importance.

On November 16th defendant in said action served upon plaintiff his statement on motion for a new trial, and thereafter, to wit: on November 28th, co-respondent served upon plaintiff a notice that, on December 4th, she would move the court for an order permitting her to adopt as her own the proposed statement of defendant on motion for a new trial, and have the same considered as served and filed as her proposed statement of the case in support of her motion, and that the order be made as of the date of the filing by defendant of such statement. In support of this motion she filed affidavits of her attorney and that of defendant's attorney, to the effect that the attorney for co-respondent was for several days, extending from November 6th, engaged in the trial of another case, and on November 8th, finding that the trial of such case would take more time than anticipated, he made an agreement with defendant's attorney, who was preparing his (defendant's) statement, that the same should be signed, served, and used for both defendant and co-respondent in support of their respective motions; that defendant's attorney was likewise busy with other matters and assigned the preparation, service, and filing of the statement to another attorney, without telling him of the agreement so made, who in ignorance thereof served and filed the same as a statement in support of the motion for defendant alone. This motion was duly presented and by the court denied, but no record of such order was at the time entered. Co-respondent then applied to the court for permission to renew her said motion, which application being granted, she, on February 5th, moved the court, as in the first motion made; whereupon plaintiff's attorney objected to the granting of the same upon the grounds that the court

had no jurisdiction to grant it for the reason that the time within which co-respondent was entitled to serve her proposed statement expired within the period of the first extension granted, to wit: October 16th, and that she had never served upon plaintiff any proposed statement; and that said motion was heard and denied on December 4th, and no new or additional grounds assigned for the granting of the same. On March 2d the court by its order denied the motion so renewed and ordered the minutes of the court corrected as of date December 4th, so as to show the making of the order denying the motion when first made, and later likewise denied co-respondent's motion for a new trial of the case.

Co-respondent appeals from this order made March 2d denying her application to adopt as her own the statement of defendant on motion for a new trial, as well as that part thereof ordering the correction of the minutes as stated, and likewise appeals from the order denying her motion for a new trial, notice of appeal from which last mentioned order, however, was not served upon plaintiff.

The above narrative should be deemed a sufficient answer to the merits of the appeal.

No error can be predicated upon the ruling of the court in denying co-respondent's motion for a new trial for the reason that, since no statement had been settled and allowed, there was nothing before the court to support such motion. (*Symons v. Bunnell*, 101 Cal. 223, [35 Pac. 770]; *Sutton v. Symons*, 100 Cal. 576, [35 Pac. 158].) Conceding the want of a settled statement to be due solely to an error of the court in refusing to allow the same, it cannot avail a party aggrieved on appeal from such order, since upon the record nothing appears to show the alleged errors upon which the motion is based. For this reason, as well as for the want of service of the notice of appeal therefrom, and the fact that the record does not contain the paper specified in section 661 of the Code of Civil Procedure, as required by section 952, same code, the order denying the motion for a new trial must be affirmed.

Plaintiff was not a party to the agreement made by co-respondent with defendant on November 8th, and waiving the objection as to time, it cannot be claimed that co-respondent was entitled as of right to present and have considered in

support of her motion for a new trial a statement never served upon plaintiff, as required by section 659 of the Code of Civil Procedure, and in the preparation and settlement of which she had no part and was given no opportunity to submit amendments thereto.

Appellant was clearly in default in failing to prepare and serve her statement within the period ending October 16th. The fact that after said date she was misled by the failure of a third party to comply with his promise to prepare and serve a statement for her, constitutes no ground for relief from such default.

The orders appealed from are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1137. Third Appellate District.—November 29, 1913.]

JOHN MORRIS, Appellant, v. W. A. IDEN et al., Respondents.

LANDLORD AND TENANT—LEASE—FORM OF INSTRUMENT.—No technical or particular form of words is required in the formulation of a written lease. Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient.

ID.—CONTRACT TO CARRY ON DAIRY—WHETHER CONSTITUTES LEASE.—A written agreement which provides that the second party thereto "is to care for, milk, separate, feed hogs, cows, calves, and do all the work necessary to the success and cleanliness" of a certain dairy located on described land; that the first party "is to furnish all feed necessary to the success of said dairy, and keep on the premises" a certain number of cows, for which he is to receive one-third of the income of the dairy; that "the life of this lease is three years from date"; and that "it is agreed between the first and second parties to this lease that the second party must absolutely care for stock satisfactorily to first party and his failure to do so is a forfeiture on his part," constitutes a lease, rather than a contract of employment.

ID.—ASSIGNMENT OF LEASE—WHEN PERMISSIBLE.—Since such instrument is a lease, and not a contract for personal services, the lessee

is entitled to assign it if it contains no stipulation against assignment.

ID.—INJUNCTION AGAINST BREACH BY LESSOR—RIGHT OF LESSEE TO INVOKE.—If the lessor in such case, when only a little over two months of the term of three years of the tenancy has elapsed, advertises for sale the personal property mentioned in the lease, and thus threatens an act which, in view of the character of the business for which the property is to be used, will practically result in terminating the lease and so destroying the rights of the lessee's assignee, the assignee is entitled to the protection of the injunctive jurisdiction of a court of equity.

APPEAL from a judgment of the Superior Court of Tulare County and from an order sustaining a demurrer to the complaint. J. A. Allen, Judge.

The facts are stated in the opinion of the court.

H. B. McClure, for Appellant.

C. L. Russell, for Respondents.

HART, J.—This is an appeal by the plaintiff from a judgment entered upon an order sustaining a demurrer to the complaint.

The complaint, which is verified, alleges that the defendant, W. A. Iden, and one G. S. Mattos, on the eleventh day of July, 1912, at the county of Tulare, state of California, entered into the following agreement:

“Tulare, California, 7-12-12.

“This Agreement made and entered into this 11th day of July, 1912.

“Between W. A. Iden of Tulare, California; the party of the first part, and G. S. Mattos of Tulare, California; the party of the second part, witnesseth:

“That G. S. Mattos is to care for, milk, separate, feed hogs, cows, calves, and do all the work necessary to the success and cleanliness of that certain dairy located on the Northeast quarter Section Seven, 21, 23, and W. A. Iden is to furnish all feed necessary to the success of said dairy, and keep on the premises the same number, not less than fifty, or a greater number of cows on said premises as may seem necessary to the success of same. As a remuneration for said second party, he

is to receive one-third of the income of said dairy, including hogs, calves and butter fat. The life of this lease is three years from date.

"Witness our hands this 11th day of July, 1912.

"Signed, W. A. IDEN.

"Signed, G. S. MATTOS.

"It is agreed between first and second parties to this lease that the second party must absolutely care for stock satisfactorily to first party and his failure to do so is a forfeiture on his part.

"W. A. IDEN.

"G. S. MATTOS."

In accordance with the terms of the foregoing agreement, so the complaint continues, said Mattos entered upon and took possession of the northeast quarter of section seven, in township twenty-one south, of range twenty-three east, M. D. M., and also took possession of all the personal property on said land, comprising the livestock and implements and equipments connected with and essential to the carrying on of the dairy business mentioned in said agreement.

The complaint further alleges that, on the nineteenth day of July, 1912, said Mattos "sold, assigned and transferred to plaintiff herein all his right, title and interest in and to said lease, and the real and personal property therein and hereinbefore described, and that ever since said last-named date said plaintiff has been and now is in the possession of the whole of said real and personal property under and by virtue of said lease," etc.

The complaint then charges "that defendants have advertised by publishing and posting notices that they will, commencing Wednesday, September 25, 1912, at the hour of ten o'clock A. M. sell at public auction to the highest bidder all the personal property hereinbefore described and mentioned in said lease and now in the possession of plaintiff, and plaintiff alleges that said defendants, and each of them, threatens and intends, on the twenty-fifth day of September, 1912, to sell the whole or a great portion of the personal property hereinbefore described and mentioned in said lease, and will thereby prevent and deprive plaintiff from the possession, use and increase thereof, and will cause plaintiff great and irreparable injury and damage in, that the taking away of

the possession of said personal property from plaintiff will deprive plaintiff of his rights under said lease, to receive the income from said dairy and his share in the increase of said cows, hogs and butter fat, and for which injury plaintiff has no plain, speedy or adequate remedy at law."

The relief asked for is that the defendants be temporarily restrained by injunction from selling, disposing of or otherwise interfering with the plaintiff's possession of the personal property referred to in said agreement and more particularly described in the complaint pending the determination of the issues tendered by the complaint, and that, "upon a final hearing, said injunction be made for the full term of said lease, and for such other and further relief as to the court may seem just and equitable, and for plaintiff's costs of suit herein."

The controversy involved in this appeal hinges entirely upon the determination of the nature, in legal effect, of the instrument pleaded in the complaint and above quoted.

It is the contention of the plaintiff that the said instrument is a lease of the premises described therein and of the personal property specifically mentioned in the complaint, said property, both real and personal, constituting a dairy and essential to the prosecution of the dairy business.

On the other hand, the defendants contend that said instrument merely involves a contract of employment—that is, that it was simply intended by the parties as evidence of the hiring of the plaintiff's assignor to perform certain services for the defendants during a stipulated period of time and for a stipulated compensation—and that, being for personal services, said agreement cannot be assigned, nor will injunction lie to prevent the violation of its covenants.

Counsel for the defendants, in his brief, states that, upon the filing of the complaint herein, the court below granted a temporary restraining order and a citation requiring the defendants to appear and show cause why the restraining order should not remain in force during the pendency of the action; that, pursuant to said order to show cause and after a hearing thereon, the court dissolved and vacated the temporary restraining order so issued and denied to plaintiff an injunction *pendente lite*. Counsel further states that, since the only relief which could have been afforded the plaintiff was by in-

junction, for which alone he sued, and any action which may now be taken could not have the effect of protecting or safeguarding the rights which he alleges the defendants threatened to violate, his proper remedy was in an appeal from the order dissolving the restraining order which had been issued and denying him an injunction pending the litigation. In other words, it is argued that, the restraining order having been ordered dissolved and an injunction *pendente lite* denied, and the plaintiff having failed to take an appeal from said order, nothing can now avail the plaintiff by a reversal of the judgment from which this appeal is prosecuted. But, conceding the soundness of the position thus urged by the respondents, an insuperable objection against the consideration of it by this court lies in the fact that there is not a word in the authenticated record indicating that a restraining order was ever issued by the court or that any hearing or proceedings involving a temporary restraining order or an injunction *pendente lite*, were ever had before or disposed of by the court. All this information comes solely from the brief of counsel, and obviously it cannot be considered as a part of the record of the case.

All that appear before us are the complaint, in which the plaintiff asks for a temporary and finally a permanent injunction, a demurrer to said complaint by the defendants and an order by the court sustaining the demurrer and judgment thereupon entered in favor of the defendants, and from which this appeal is taken. By this record alone, obviously, we must be guided in reaching a conclusion, and whether such conclusion, if it be in favor of the plaintiff, may or may not result in any practical advantage to him, or whether, upon the record as it was actually made up, the plaintiff could have invoked, so far as a hearing in this court is concerned, a more efficacious remedy than that presented here, are propositions as to which, so far as the decision by this court is itself concerned, we are not charged with any degree of solicitude.

The only question before us is whether the complaint states a cause of action for an injunction, and, as stated, this must be determined by a solution of the question whether the written agreement into which Mattos and Iden entered is a lease of the property described therein or a mere contract of hiring or employment.

We think the complaint states a cause of action, which is to say that the instrument or written agreement upon which the action is founded was intended by the parties to operate as a lease of the property therein mentioned.

No technical or particular form of words is required in the formulation of a written lease. "Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient." (18 Am. & Eng. Ency. of Law, p. 605, and cases cited in the footnotes.)

In the case at bar, while the written instrument set out in the complaint is not in the precise phraseology usual to leases or instruments demising real property, nevertheless it cannot, upon fair and reasonable construction, be held to mean anything else than that the "party of the first part," Mattos, is thereby authorized to enter upon and hold for a term of three years the possession of certain real and personal property, all said property constituting the equipments of a dairy business, and that for the use of said property he would return to the owner thereof certain stipulated compensation. It is true, as counsel for the defendants declares in support of his contention that the instrument is a mere agreement whereby the defendants employed the plaintiff's assignor to take charge of and conduct the dairy business, that the only language of the writing which refers to compensation relates to the "remuneration" of the plaintiff. But this provision of the instrument whereby it is covenanted that the plaintiff shall "receive one-third of the income of said dairy," etc., necessarily implies that the owner of the property is to receive two-thirds of such income. We then have before us an instrument which clearly shows the names of the contracting parties, the premises leased, the rental, and the term, an intention on the part of the owner of the property to dispossess himself of the premises, and, he having signed the lease and thus expressly accepted its terms, Mattos's intention to enter upon and hold possession in subordination to the owner's title. Thus it appears that all the essentials of a lease are present in the agreement. (*Dodd v. Pasch*, 5 Cal. App. 686, [91 Pac. 166]; 18 Am. & Eng. Ency. of Law, p. 605; *Eastman v. Perkins*, 111 Mass. 35.)

Moreover, we find in the instrument language which, considered by the light of its entire context, may fairly and reasonably be held to involve a construction by the parties themselves of the agreement, and indicating what they intended its legal effect should be. The last clause of the instrument reads: "The life of *this lease* is three years from date." It is readily to be conceded, as counsel for the defendants contends, that the character of a legal instrument is not necessarily what the author of the instrument or the parties thereto may call it. For illustration, an instrument may characterize itself as a deed, whereas its language or terms may clearly disclose that it is a mere lease, and in that case, manifestly, its legal effect could not be extended beyond that of a lease, notwithstanding that the parties called it a deed. But the language referred to in the writing in this case becomes very significant when it is considered in connection with the fact, as shown by the complaint, that Mattos actually entered upon and took possession of the real and personal property mentioned in the agreement. Furthermore, the clause added to the instrument by the parties seems to leave little room for doubting that they intended that the word "lease" as used in the writing should bear its ordinary legal signification. Said clause, it will be observed, reads as follows: "It is agreed between the first and second parties to *this lease* that the second party must absolutely care for stock satisfactorily to first party and his failure to do so is a *forfeiture* on his part." Forfeiture of what? The defendants would doubtless reply: a forfeiture of the plaintiff's right under the agreement to remain in the employment of the defendants. But the word "forfeiture" is an inapt term by which we would ordinarily express or describe the penalty for violating the conditions upon which one may be employed to perform certain personal services. On the other hand, it is peculiarly applicable to and the one that is ordinarily used in a lease and like instruments in which are imposed upon the lessee certain conditions, the violation of which was intended to have the effect of forfeiting his rights under the lease and so terminating his tenancy before the expiration of the stipulated term. It is, therefore, the more reasonable to assume that, if the instrument was intended by the parties as a mere contract for the hiring of the services of Mattos, they would probably have expressly stipulated in the agreement that

failure on the part of Mattos properly to perform the services contemplated by the instrument, or his failure to give the personal property proper care or otherwise to conduct the dairy business properly and successfully, would operate to terminate his employment or the contract of employment. But, as before indicated, aside from these considerations, the general tenor of the agreement—the giving of possession to Mattos, the length of the term of the tenancy and the covenant as to the division of the profits between the parties—with sufficient clearness show that the agreement was intended by the parties as a lease of the property therein mentioned.

It follows from the foregoing view of the legal nature of the agreement that the discussion by counsel for the defendants of the nonassignability of the instrument, said discussion being based upon the theory that the writing constitutes only a contract for personal services, can have no application here. There is nothing in the lease itself which prohibits the assignment thereof by the lessee, hence he had a perfect legal right to assign it to the plaintiff. (Civ. Code, sec. 1044.)

But it is contended by the defendants that injunction will not lie to prevent the breach of the covenants of a lease by the lessor. This position is grounded upon the general rule that an injunction will not be granted "to prevent the breach of a contract, the performance of which would not be specifically enforced" (Civ. Code, sec. 3423), and that a contract not entirely executed by one of the parties will not be enforced unless it is *mutually enforceable*. (*Vassault v. Edwards*, 43 Cal. 465; *Lattin v. Hazard*, 91 Cal. 87, [27 Pac. 515]; *Cooper v. Pena*, 21 Cal. 404.) We believe, however, that the present case comes within the exception to the general rule which has been recognized in many cases. But a little over two months of the term of three years of the tenancy had elapsed when the defendants advertised for sale the personal property mentioned in the lease and thus threatened to do an act which, in view of the character of the business for which the property was to be used, would practically result in terminating the lease and so destroying the rights of the plaintiff thereunder. Obviously, the plaintiff was without a complete and adequate remedy in the ordinary course of law, for it would be impossible, under the circumstances to estimate, except by mere conjecture, the damage he would suffer if the trespass threat-

ened by the defendants was consummated. Upon this ground he is entitled to the protection of the injunctive jurisdiction of a court of equity, notwithstanding the want of that mutuality in the contract necessary to authorize the specific enforcement of its terms. In *Gallagher v. Equitable Gas Light Co.*, 141 Cal. 699, [75 Pac. 329], and in other cases therein cited, the right to an injunction in a certain class of cases to prevent the violation of contracts which cannot be specifically enforced is distinctly recognized and put upon the ground of a want of an adequate remedy at law. Besides, the act of the defendants, in offering the property for sale, involved an act which, if consummated, would amount to a trespass, and it cannot be doubted that the remedy by injunction may be invoked to restrain acts or threatened acts of trespass in any instance where as here, it is made to appear that such acts may result in irreparable damage to the particular property involved. (*Kellogg v. King*, 114 Cal. 378, [55 Am. St. Rep. 74, 46 Pac. 166]; *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, [93 Am. St. Rep. 782, 59 L. R. A. 907, 53 Atl. 522]; *Ex parte Warfield*, 40 Tex. Cr. 413, [76 Am. St. Rep. 724, 50 S. W. 933].)

The judgment is reversed, with directions to the trial court to overrule the demurrer.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 307. Second Appellate District.—December 1, 1913.]

THE PEOPLE, Respondent, v. N. A. CARMEAN, Appellant.

CRIMINAL LAW—RAPE—TIME OF COMMISSION OF OFFENSE—EVIDENCE—

INSTRUCTIONS.—Where in a prosecution for rape evidence is introduced showing that the prosecutrix visited the defendant's place of business (where the offense is alleged to have been committed on March 2d) on March 23d and on March 27, 1913, but there is no evidence of an unlawful act between them on either of those latter occasions, and her testimony that she never had intercourse with him except on the one occasion of March 2d, is not contradicted by other testimony, an instruction to the jury that "an act of sexual intercourse committed on a girl under sixteen years of age not the wife of the accused is rape, the date of such act is imma-

terial, if it occurs at any time within three years before the filing of the information. The witnesses for the prosecution fix the date of the act testified to by them as March 2, 1913. If they are mistaken in the date this is immaterial," is not erroneous or misleading, when there is no evidence of the commission of but the one offense, and the jury is also advised that any other misconduct of the defendant is not material or proper to bring before them.

ID.—EVIDENCE ADMITTED FOR LIMITED PURPOSE—INSTRUCTIONS TO JURY
—FAILURE TO REQUEST.—The failure of the court to tell the jury that evidence of improper familiarity on the part of the defendant with the prosecutrix was admitted solely for the purpose of proving his adulterous disposition, and not as evidence of the commission of a crime on former occasions, is not error if no such instruction is asked. Where a defendant desires to restrict evidence to a particular purpose, he should so frame his objections, and ask a proper instruction to the jury.

ID.—MISCONDUCT OF DISTRICT ATTORNEY—FAILURE TO OBJECT—REVIEW ON APPEAL.—Alleged misconduct of the district attorney in asking witnesses improper questions will not be considered on appeal, in the absence of specific objection and exception based thereon.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Tom L. Johnston, and Ingle Carpenter, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant having been convicted of the crime of rape, committed upon the person of a female child under the age of sixteen years, appeals from the judgment entered pursuant to the verdict, and from an order denying his motion for a new trial.

The first and principal error alleged and relied upon by appellant consisted in the giving of a certain instruction to the jury. In that instruction the court said:

"An act of sexual intercourse committed on a girl under sixteen years of age not the wife of the accused is rape, the date of such act is immaterial, if it occurs at any time within three years before the filing of the information. The wit-

nesses for the prosecution fix the date of the act testified to by them as March 2, 1913. If they are mistaken in the date this is immaterial. If the girl Pearl Peterson was not with the defendant on March 2, 1913, and if the defendant was not at the place where the offense is alleged to have been committed on March 2, 1913, or if either of said parties was not there, it is obvious that the said offense could not have been committed on that date, and it will remain for you to determine whether or not an act of sexual intercourse was committed between defendant and Pearl Peterson at all within three years. In so determining you will observe the instructions given by the court, and if, notwithstanding erroneous testimony if you so find as to the alleged date of the alleged offense, you are satisfied beyond a reasonable doubt that the defendant committed an act of sexual intercourse upon Pearl Peterson, a female child under the age of sixteen years at any time within said three years you should find the defendant guilty."

Whether such an instruction as the foregoing was correctly given must be determined by reading the same in connection with the other instructions given, and by considering all such instructions in connection with the evidence in the case. Immediately preceding the above quoted instruction, the court said to the jury: "The court instructs the jury that it is wholly immaterial on what day or night the offense charged in the information was committed, provided you believe from the evidence it was committed, and that the same was committed within three years prior to the filing of the information in this case." The entire record shows an attempt by the prosecution to prove the commission of the offense charged at a stated time of the day on Sunday, March 2, 1913, and an attempt by the defendant to prove that he was absent from the place where the offense is alleged to have been committed, and that such absence covered the entire period of time within which the prosecution claimed that the offense was committed.

It is true that evidence was received showing that the girl in question visited the defendant's place of business (where the offense is alleged to have been committed on March 2d) on March 23d, and on March 27, 1913. But there is no evidence of an unlawful act between her and the defendant on either of those latter occasions, and her testimony to the effect that she never had intercourse with the defendant except on

the one occasion of March 2d, is not contradicted by any of the testimony in the case.

Immediately before the close of the record as to testimony given, the court in ruling upon an objection to a question said: "There is but one matter before this jury and the court, and that is whether the defendant had sexual intercourse with Pearl Peterson. Any other misconduct of the defendant at any other time or any other place, or at this place, would be immaterial and not proper to bring before the jury." This remark was justified by the record and in harmony with the entire theory upon which the case was tried. In view of these facts, we hold that the instruction objected to was not only correct as a matter of law, but also that it was not misleading with respect to the evidence in the case. It is not true that under these instructions the jury was permitted to find the defendant guilty of a similar act other than the one charged in the information, and is not true that under such instruction and with such evidence the jurors were given permission or legal opportunity to convict the defendant of an offense without agreeing upon a definite offense committed on any certain occasion.

The appellant complains that the court erred in failing to restrict the jury in its consideration of defendant's guilt to acts testified to as occurring on the first meeting of the parties, that is to say, on March 2, 1913; and in failing to tell the jury that evidence of improper familiarity on the part of defendant toward and with the prosecutrix, both before and after the time charged in the information, was received and admitted in evidence solely for the purpose of proving the adulterous disposition of the defendant and not as evidence of the commission of a crime on those other occasions. This point is sufficiently covered in the preceding paragraphs. But it may be observed in addition that the defendant did not ask the court to give any instruction whatever in this case. Where a defendant desires to restrict evidence to a particular purpose, he should so frame his objection and he should ask a proper instruction to the jury. (*People v. Monroe*, 138 Cal. 97, [70 Pac. 1072]; *People v. Fultz*, 109 Cal. 258, [41 Pac. 1040].)

Finally, it is claimed that the court erred in allowing evidence as to alleged or intimated visits of other young girls to

defendant's place of business, after objection had been made by defendant, and that the district attorney was guilty of misconduct in purposely making such intimations and insinuations by questions which he knew called for inadmissible evidence and to which defendant's objection would be sustained. We have examined the rulings admitting such evidence and find that the objections are without merit. With respect to the conduct of the district attorney, it is true that at certain times during the trial, and especially during cross-examination of the defendant, the district attorney insisted upon asking a series of improper questions as to defendant's acquaintance with certain girls who were named in the questions, and with respect to defendant's having been warned against girls being there at the place where the alleged offense was said to have been committed. Defendant's counsel objected to these questions, and the objections were sustained. It does not appear that the asking of these questions was assigned as misconduct at that time. "The trial court is always entitled to know the true character of the objection and the reasons, if any, existing in the minds of the attorneys why and for what the objection is urged, to the end that the court may intelligently consider the effect of what has been said by the court, and thus be afforded an opportunity to correct any irregularity either by instruction or otherwise. In the absence of a specific objection and exception based upon misconduct, an appellate court is not authorized to pass upon the merits of the controversy." (*People v. Osborn*, 12 Cal. App. 148, [106 Pac. 891].) Under these circumstances, the appellant is not in a position to ask a consideration of the effect of such alleged misconduct.

The judgment and order are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1199. Third Appellate District.—December 1, 1913.]

**FRANK KUMMETH, Petitioner, v. F. D. ATKISSON et al.,
Respondents.**

COSTS—NECESSITY OF STATUTORY PROVISION FOR ALLOWANCE.—The right to recover costs is a matter of statutory regulation, and, in the absence of a statute, no costs can be recovered by either party.

ID.—MANDAMUS IN APPELLATE COURT—COSTS OF TAKING DEPOSITION.—Sections 1022 and 1033 of the Code of Civil Procedure authorize the recovery of costs in an original proceeding in an appellate court for a writ of mandate; and the expense of taking a deposition, if necessarily and legally incurred, is within the contemplation of such sections.

ID.—DEPOSITION TAKEN PRIOR TO APPEARANCE BY RESPONDENT.—But where depositions in such a proceeding are taken on behalf of the respondent prior to his appearance and the presentation therein of any issue of law or of fact, the expense of taking them is not properly chargeable against the petitioner on the denial of the writ, under section 2021 of the Code of Civil Procedure providing that the testimony of a witness may be taken by deposition "in a special proceeding after a question of fact has arisen therein."

MOTION to tax costs in a proceeding for a writ of Mandate.

The facts are stated in the opinion of the court.

W. D. Crichton, and C. K. Bonestell, for Petitioner.

H. A. Savage, for Respondents.

BURNETT, J.—This is a motion to tax costs in an original proceeding in this court for a writ of mandate. A demurrer to the petition was sustained and the peremptory writ was denied. All the items specified in the memorandum of costs filed therein include and relate to disbursements made on the taking of depositions of several witnesses on behalf of respondents.

It is well settled that the right to recover costs is a matter of statutory regulation and, in the absence of a statute, no costs can be recovered by either party. (*Williams v. Atchison etc. Ry. Co.*, 156 Cal. 140, [134 Am. St. Rep. 117, 19 Ann. 23 Cal. App.—26

Cas. 1260, 103 Pac. 885]; *Bond v. United Railroads of San Francisco*, 20 Cal. App. 124, [128 Pac. 786].)

Sections 1022 and 1033 of the Code of Civil Procedure authorize the recovery of costs in a case like this, and the expense of taking a deposition, if necessarily and legally incurred, is within the contemplation of said provisions. (*Naylor v. Adams*, 15 Cal. App. 353, [114 Pac. 997].) But, to make the expense in taking it chargeable against the losing party, the deposition must, of course, be authorized by the statute. As to that the particular provision of the law applicable here is section 2021 of the Code of Civil Procedure, as follows: "The testimony of a witness in this state may be taken by deposition in an action at any time . . . in a special proceeding after a question of fact has arisen therein," etc.

An application for a writ of mandate is undoubtedly a "special proceeding" and at the time the depositions herein were taken it is shown that there had been no appearance by respondents, and no issue of law or fact was presented until the demurrer and answer were filed at the time the order to show cause was heard, some two weeks after said expense was incurred.

It is entirely clear, therefore, that the said costs are not legally chargeable against petitioner and all the items specified in the cost bill filed herein should be and are disallowed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1363. Second Appellate District.—December 3, 1913.]

PEATLAND REALTY COMPANY (a Corporation), Appellant, v. J. H. EDWARDS, Respondent.

SALE OF JACK—CONSTRUCTION OF CONTRACT—CONDITION PRECEDENT TO CONSUMMATION OF SALE—DEATH OF ANIMAL.—Under a contract providing that the "first party has sold unto the second parties," for a valuable consideration, a certain jack "upon the following conditions, possession of jack to pass to second parties at once. First party guarantees jack to serve mares and to get at least sixty (60%) of stock served the first year with foal. In case of

failure in either of foregoing provisions first party agrees to surrender to second parties their notes upon return of said jack, this contract to be liberally construed so as to protect the rights and interests of the parties hereto," the provision that the jack should get sixty per cent of the mares served with foal is a condition precedent upon the performance of which the consummation of the sale depends; and where the jack dies within the year, without the fault of the second parties, and fails between the time of delivery of possession and death to get more than thirty-eight per cent of the stock served with foal, the second parties may set up these facts as a defense to an action on the purchase-money notes.

ID.—MEANING OF WORD "SOLD"—EXECUTORY AGREEMENT.—While the word "sold" primarily means a consummated sale passing title, such meaning is controlled by the context, which here clearly indicates an executory agreement not intended to transfer title, except upon the performance of the condition specified.

APPEAL from a judgment of the Superior Court of Orange County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

B. E. Tarver, and H. C. Head, for Appellant.

E. E. Keech, and John N. Anderson, for Respondent.

SHAW, J.—Defendant and two others purchased from plaintiff a jack for the agreed price of which each of them executed his note to plaintiff in the sum of \$433.33. The action is against defendant to recover upon the note so made by him to plaintiff. The answer admits the making of the note and nonpayment thereof, and as a separate defense sets up a contract alleged to have been made at the same time and as a part of the same transaction in which the note was signed and delivered, which contract is as follows:

"An agreement, made this 15th day of February, 1906, between the Peatland Realty Company, a corporation, with principal place of business at Smeltzer, Orange Co., California, party of the first part, and Robert McClintock, J. H. Edwards and M. C. Cole, all of the same place, parties of the second part,

"Witnesseth: That for a valuable consideration and the covenants hereinafter mentioned, first party has sold unto second parties a Blue Jack about seven years old for Thirteen

Hundred Dollars (\$1300) upon the following conditions, possession of Jack to pass to second parties at once.

"First party guarantees Jack to serve mares and to get at least sixty (60%) of stock served the first year with foal. In case of failure in either of foregoing provisions first party agrees to surrender to second parties their notes upon return of said Jack, this contract to be liberally construed so as to protect the rights and interests of the parties hereto.

"Signed and sealed the day and year first above written.

"ROBERT MCCLINTOCK, J. H. EDWARDS, M. C. COLE.

"Peat Land Realty Company,

(Seal)

"Per W. T. Clark, Pres."

It is further alleged that on February 15, 1906, possession of the jack was delivered to said defendants and his associates; that it was properly cared for and used in the service of mares during the entire breeding season and up to December 15, 1906, on which date, without fault of defendant or either of the other parties having said jack in charge, it died, of which fact plaintiff had notice but failed to surrender to defendant his note; "that said jack during said time from February 15, 1906, to December 15, 1906, failed to get sixty per cent of the stock served with foal, and did not get more than thirty-eight per cent with foal."

An order of the court overruling a general demurrer interposed by plaintiff to the answer, presents the sole question on appeal.

In our opinion, the provision that the jack should get sixty per cent of the mares served with foal was a condition precedent upon the performance of which the consummation of the sale depended. As here used, the word "upon" indicates a state of dependence. (*Welch v. Matthews*, 98 Mass. 131; *Powell v. Dayton, S. & G. R. Co.*, 14 Or. 356, [12 Pac. 665].) The statement in the agreement that plaintiff had sold the jack to defendant upon the conditions named, clearly implies that the sale thereof was dependent upon performance of the conditions, and the insertion therein of the clause (wholly unnecessary if it was a consummated sale), "possession of jack to pass to second parties at once," indicates that the parties understood that title was not to pass but should remain in the seller until the performance of the condition. The case is similar to one where by an order of court a party

is given the right to plead on payment of costs. Payment is a condition precedent to the exercise of such right to plead. (*Sands v. M'Clelan*, 6 Cow. (N. Y.) 582.) If we are correct in this conclusion, it must follow, since under section 1439 of the Civil Code, "before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent thereto imposed upon himself," that the answer constitutes a sufficient defense, for performance of the condition precedent upon which the consummation of the sale depended was never fulfilled, and title to the jack being vested in plaintiff and it having died without fault of defendant or his associates, they were in no wise responsible for its loss. While it is true, as contended by appellant, that the word "sold" primarily means a consummated sale passing title, such meaning is controlled by the context, which here clearly indicates an executory agreement not intended to transfer title, save and except upon the performance of the condition specified. (*Christensen v. Cram*, 156 Cal. 633, [105 Pac. 650]; *Potts Drug Co. v. Benedict*, 156 Cal. 322, [104 Pac. 432].) Defendant was not seeking a rescission of the contract, as suggested by appellant, but seeking to enforce the contract in accordance with its terms,—namely: that the jack having failed to perform the conditions, upon which performance the sale was contingent, he demanded a surrender of the note evidencing the purchase price thereof.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1323. Second Appellate District.—December 3, 1913.]

GEORGE F. HOFFECKER, Appellant, v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al., Respondents.

MUNICIPAL CORPORATION—PROCEEDING TO INCORPORATE—PETITION OF ELECTORS—AFFIDAVITS AS TO SIGNATURES.—In proceedings for the incorporation of a city of the sixth class, the affidavit of three qualified electors, filed with the petition, certifying the genuineness of the signatures to the petition of more than fifty of the qualified electors of the county residing within the proposed limits, is *prima*

facie evidence of the requisite number of signers; and if no other evidence is presented to or considered by the board of supervisors, it is bound to determine that it has jurisdiction to make its order, so far as such jurisdiction depends upon the number of qualified electors signing the petition.

ID.—WRIT OF REVIEW—QUESTIONS THAT MAY BE CONSIDERED.—In proceedings for a writ to review the action of the board of supervisors in granting such petition, the court cannot take into consideration any facts other than those which would appear in a return by the board showing the record of the proceedings before it; and in this case the return would show that the petition was signed by the requisite number of qualified electors, and therefore the alleged want of jurisdiction upon the ground of defect in number of qualified electors could not be made to appear in this proceeding.

ID.—NOTICE OF PETITION—PUBLICATION FOR TWO WEEKS.—The publication of the petition for incorporation, reciting that the same will be presented on September twentieth, in the issues of September thirteenth and twentieth of a weekly newspaper, is a sufficient publication for two weeks, and fulfills the requirements of the statute.

ID.—PUBLICATION ONCE A WEEK—DAILY OR WEEKLY NEWSPAPER.—A requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week for the designated number of weeks in a daily newspaper published in the county. The same is true when the newspaper is only of weekly publication.

APPEAL from an order of the Superior Court of Los Angeles County, dismissing plaintiff's petition and the writ of review issued herein. J. P. Wood, Judge.

The facts are stated in the opinion of the court.

James Donovan, and William B. Ogden, for Appellant.

J. D. Fredericks, District Attorney, Byron Hanna, Chief Deputy District Attorney, A. J. Hill, Deputy District Attorney, Geo. S. Hupp, and Frank E. Hill, for Respondents.

CONREY, P. J.—The appeal herein is from an order made and entered in the above-named superior court dismissing plaintiff's petition and the writ of review issued in the above-entitled cause.

It appears from the petition that on October 25, 1912, the board of supervisors of Los Angeles County granted the prayer of the petitioners in certain proceedings incident to

the proposed incorporation of a city of the sixth class, to be known as the city of Manhattan, and ordered an election to be held on November 25, 1912, for the purpose of determining whether said proposed city should become incorporated. The petition of the plaintiff herein was filed on November 20, 1912, and the writ was on that day issued and made returnable on November 23, 1912. It was on this last-named date that, in response to a motion of defendants, the court made the order from which the appeal is taken.

In substance, the claims of the plaintiff are that the board of supervisors was without jurisdiction to order said election, and that said want of jurisdiction resulted from the following facts, namely: 1. That less than fifty qualified electors of the county resident within the limits of the proposed incorporation were signers of the petition for incorporation; and, 2. That the petition for incorporation had not been published for at least two weeks before the time at which the same was to be presented to the board. Two other alleged defects in the proceedings are mentioned in the petition, but as these are obviously without merit and are not discussed in the briefs, they do not require further attention here.

One of the grounds of the motion to quash or set aside the writ and the petition herein was that, for reasons stated in the motion, the case is not one wherein a writ of *certiorari* properly issued. In a similar case the supreme court said: "It may be conceded, but only for the purposes of this case, that the board of supervisors, in determining that a proper petition has been so presented, supported by a proper affidavit that notice was published, acts judicially, or at least *quasi* judicially, and that its determination upon these matters is therefore subject to review." (*Borchard v. Board of Supervisors*, 144 Cal. 10, [77 Pac. 708].) We shall here make the same concession or assumption and proceed to determine whether the writ is maintainable on the facts of this case.

The transcript herein contains a copy of the affidavit of publication of notice of the petition for incorporation, including the petition itself and the statutory affidavit of three qualified electors certifying the genuineness of the signatures to the petition. Said documents last named were on file with the board of supervisors prior to the time when it ordered the election. The transcript does not definitely show that said

papers on file in the office of the board of supervisors were before the court as a part of the respondents' return on the writ of review at the hearing on November 23, 1912; but the petition herein refers to said petition for incorporation and said affidavit of publication and incorporates some of the contents thereof. This fact, together with the fact that the briefs herein assume said affidavit and copy of petition as a part of the record on appeal, will reasonably authorize us to make the same assumption.

It appears then that the board of supervisors, in granting said petition for the calling of an election to determine whether the proposed city should become incorporated, had before it a petition duly verified as the petition of more than fifty of the qualified electors of the county residing within the proposed limits. The affidavit filed with the petition was *prima facie* evidence of the requisite number of signers. (Municipal Corporations Act of 1883, [Stats. 1883, p. 94], sec. 2, as amended in 1889; Stats. 1889, p. 371.) It does not appear that any other evidence was considered by the board or presented to it for consideration. Upon the facts thus produced before the board it determined, and was bound to determine, that it had jurisdiction to make its order, so far as such jurisdiction depended upon the number of qualified electors signing the petition. In this proceeding for a writ of review the court cannot take into consideration any facts other than those which would appear in a return by the board of supervisors showing the record of the proceedings before it. The facts being as above stated, the return would show that the petition was signed by the requisite number of qualified electors, and therefore the alleged want of jurisdiction upon the ground of defect in number of qualified electors could not be made to appear in this proceeding.

The only other contention on behalf of plaintiff is that the notice that the petition would be presented on September 30, 1912, was not published for two weeks prior to the meeting of that date. The petition herein admits and the affidavit of publication shows that the notice was published on September 13, and on September 20, 1912, in a newspaper published weekly at the city of Redondo in said county of Los Angeles. This was a sufficient publication for two weeks and fulfills the requirements of the statute. "It is settled in this state that

a requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week for the designated number of weeks in a daily newspaper published in the county." (*Sherwood v. Wallin*, 154 Cal. 735, [99 Pac. 191].) Of course, the same is true when the newspaper is only of weekly publication. None of the decisions cited by appellant are in conflict with the rule thus stated.

The order appealed from is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1143. Second Appellate District.—December 8, 1913.]

W. E. SMILEY et al., Respondents, v. JOHN W. WATSON,
Defendant; ELLA W. BAKER et al., Appellants.

PROMISSORY NOTE—PROMISE OF PAYEE TO ADVANCE MONEY TO BUILD HOUSE—BREACH OF AGREEMENT—FAILURE OF CONSIDERATION—ACTION TO CANCEL NOTE.—Where a promissory note, secured by a deed of trust and providing that on default in payment of interest the whole sum of principal and interest shall immediately become due at the option of the holder, is executed on the oral agreement of the payee to advance the money specified therein to the makers in certain installments as the erection of a house by them progresses, and the payee advances only a small part of the money called for by the note and transfers the note before maturity and for value to one without notice, the makers can maintain a suit to cancel the note and deed of trust.

ID.—NEGOTIABILITY OF NOTE—OPTION OF HOLDER TO DECLARE DUE ON DEFAULT IN PAYMENT OF INTEREST.—Such note, secured by a deed of trust and due in three years with interest payable quarterly, is rendered non-negotiable by the clause "should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note."

ID.—CANCELLATION OF INSTRUMENTS—TENDER OF MONEY RECEIVED.—In this action by the makers to have the note and deed of trust canceled, the payment by the plaintiffs into court, at the time of bringing suit, of the small amount of money received by them from the payee, to abide the result of the action, is a sufficient compliance with subdivision 2 of section 1691 of the Civil Code relating to restoration on rescission.

APPEAL from a judgment of the Superior Court of Los Angeles County. K. S. Mahon, Judge presiding.

The facts are stated in the opinion of the court.

Jones & Evans, for Appellants.

M. M. Ferguson, and Paul E. Ussher, for Respondents.

SHAW, J.—On January 24, 1911, plaintiffs negotiated from defendant Watson a loan of one thousand one hundred dollars with which to erect a dwelling-house upon a lot owned by them, it being orally agreed that the money so borrowed should be paid and advanced by Watson as the work progressed upon the building,—namely: one-fourth thereof when the dwelling was boarded in; one-fourth when plastered; one-fourth at the time when notice of completion was filed, and the balance thirty-five days after the filing of said notice of completion. Thereupon, on said twenty-fourth day of January, 1911, plaintiffs made and delivered to Watson their promissory note as follows:

“\$1100.00.

“Los Angeles, Cal., January 24th, 1911.

“Three years after date, for value received, we or either of us promise to pay John W. Watson, or order, at Los Angeles, California, the sum of eleven hundred dollars, with interest at the rate of twelve per cent per annum from date until paid, interest payable quarterly, and if not so paid, to be compounded quarterly and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. This note is secured by a deed of trust to the Title Guarantee & Trust Company (a corporation) of Los Angeles, California, and may be registered when accompanied with the deed of trust duly recorded on presentation at the company's office.

“TILLIE NOPPER SMILEY,

“WILLIAM E. SMILEY.”

And at the same time they made and delivered to defendant corporation a deed of trust conveying to said corporation as trustee the real estate therein described, as security for the payment of said promissory note, as well as to secure the performance of other conditions contained in said deed of trust. On January 27th following, Watson sold and transferred the note to defendant Ella W. Baker, who took the same for value and without notice of the fact that plaintiffs had not received any part of the amount of money specified in said note. On February 7, 1911, plaintiffs commenced the erection of the house, and on the seventeenth day of March, 1911, the same was fully boarded in. On March 22, 1911, and after plaintiffs had knowledge of the transfer of the note to Baker, they received from Watson the sum of seventy-five dollars, which was all that plaintiffs ever received in consideration of the making of said note and deed of trust. Thereafter, by reason of plaintiffs' default in the payment of interest on said note, appellant Baker threatened to exercise her option to declare the whole sum mentioned therein due and sue to foreclose same; whereupon plaintiffs brought this action to have the note and deed of trust delivered up and canceled and to compel a reconveyance of the property so by them conveyed to said corporation as trustee, and at the same time paid into court the sum of seventy-five dollars, so received by them from Watson, to be paid to him upon the order of the court. Judgment went for plaintiffs, from which defendants Ella W. Baker and the corporation appeal.

Appellants insist: 1. That there was no failure of consideration for the note and trust-deed; 2. Conceding such failure, the note was negotiable, acquired by defendant Baker before maturity in good faith and for value, and hence not subject to the defense of want of consideration; and, 3. Plaintiffs were not entitled to maintain the action for the reason that, prior to the bringing of suit, they had not as a condition of rescission returned to Watson the seventy-five dollars. In support of the first proposition, appellants cite the case of *Lawrence v. Gayetty*, 78 Cal. 126, [12 Am. St. Rep. 29, 20 Pac. 382], wherein it was held that where an unqualified conveyance is made upon consideration of a promise to perform certain work and place certain improvements upon the property conveyed and pay the purchase price in the future,

there can, in the absence of fraud, be no cancellation of the deeds for failure to make such payment. Such, however, is not this case. The promise on the part of plaintiffs to pay the one thousand one hundred dollars in accordance with the terms of the note was evidenced by writing, while the promise on the part of Watson to advance to plaintiffs the one thousand one hundred dollars in consideration of the promise contained in the note, as the building of the house progressed, was oral. The contract as to both was executory, while in the case cited title to the property was transferred by an unqualified conveyance. In *Briggs v. Crawford*, 162 Cal. 124, [121 Pac. 381], the facts of which are similar to those in the case at bar, it was said: "Where a consideration for a mortgage fails in whole or in part that fact is the essential matter to be established . . . in a cause like the one at bar. Whether the failure is due to breach of a written or a verbal agreement is immaterial." It would be indeed a monstrous proposition to hold that one who has secured from another a promissory note in consideration that he should advance the money specified therein upon the performance of certain conditions by the maker thereof, and after such performance, could withhold payment of the money and enforce payment of the note in accordance with its terms.

In support of the second proposition, that the note is negotiable, appellants insist that the giving of a mortgage to secure payment does not affect the negotiability of a note, citing the case of *McDonald v. Randall*, 139 Cal. 246, [72 Pac. 997], which holds that the giving of a mortgage to secure the payment of a negotiable promissory note does not affect its negotiability. This, however, is in direct conflict with the case of *Meyer v. Weber*, 133 Cal. 681, [65 Pac. 1110]; *Briggs v. Crawford*, 162 Cal. 129, [121 Pac. 381]; and *National Hardwood Co. v. Sherwood*, 165 Cal. 1, [130 Pac. 881]; in which last case it is said "the McDonald case cannot be considered as a decision overruling *Meyer v. Weber*," and further, "it appears to be settled by the decisions of this court that where a note is secured by a mortgage on land, both being executed at the same time, or as parts of one transaction, the note, although negotiable in form, is not negotiable in law, where the purchaser takes it with knowledge of the existence of the mortgage." In the Meyer-Weber case the court held

that the note and mortgage constituted one transaction, and under the provisions of section 1642 of the Civil Code, they must be construed together. While the note involved in that case did not so provide, the mortgage given to secure the same contained a provision to the effect that in case of default in the payment of any installment of interest, payable before the maturity of the note as therein provided, the payee might at his option declare the principal due immediately. The court held that such cause so inserted in the mortgage was obnoxious to the provisions of section 3088 of the Civil Code, as follows: "A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof"; and also violated the provisions of section 3093, in that it constituted a contract other than one specified in the article containing these sections. The note here involved is due three years after date, with interest payable quarterly, and contains the provision that, "should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." We are unable to distinguish a transaction where such a clause is inserted in the note from one wherein it is omitted from the note, but inserted in the mortgage construed with and considered as a part of the note. If in the latter case it renders the note non-negotiable, its insertion in the note itself must for like reasons have like effect. The weight of authority elsewhere supports the contrary view, and we would be reluctant, by reason of the importance of the question as affecting the commercial interest, in following the doctrine announced in *Meyer v. Weber* were it not for the fact that in the late case of *National Hardwood Co. v. Sherwood*, 165 Cal. 1, [130 Pac. 881], the supreme court sitting in Bank reiterated the doctrine and reasserted that such provision contained in a mortgage, but omitted from the note, is obnoxious to section 3088 of the Civil Code, and renders the note non-negotiable. While the note in question in terms fixes a time certain when it will mature, such specified time is qualified and rendered uncertain by the contingency due not only to the uncertainty as to whether or not the maker

will default in the payment of interest quarterly, but, in case he does, whether the holder will exercise his option to declare the principal due. Upon the authorities cited, we are constrained to hold that under the provisions of sections 3088 and 3093 of the Civil Code, the insertion in the note of the clause giving the holder thereof the right at his option, in case the maker failed to pay the interest quarterly, to declare the principal due and payable before the time specified for the maturity of the note, rendered it non-negotiable. Counsel in arguing the case have assumed that the law applicable to a note secured by a mortgage is likewise applicable where the security given is by deed of trust. While the distinction between the two instruments is obvious, since in reducing the security the provisions of section 726 of the Code of Civil Procedure, with reference to procedure, have no application to the deed of trust, our view renders it unnecessary to enter upon the discussion of a subject not presented either by brief or oral argument.

Under the circumstances shown, the action on the part of plaintiffs at the time of bringing the suit in paying the seventy-five dollars so received from Watson into court to abide the result of the suit, fully satisfied subdivision 2 of section 1691 of the Civil Code, which provides that the party seeking to rescind shall "restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Moreover, no objection based upon such ground was interposed by pleadings or otherwise in the trial court, and defendants should not be heard when urging it for the first time on appeal.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1284. First Appellate District.—December 4, 1913.]

In the Matter of the Estate of IDA OLIVE HODGDON, Deceased. In the Matter of the Contest of the Will of said Decedent, by Samuel R. Crooks; SAMUEL R. CROOKS, Contestant and Appellant, v. HERBERT F. HODGDON, Individually and as Executor, etc., Respondent.

WILL—UNDUE INFLUENCE AS GROUND FOR REVOCATION OF PROBATE—SUFFICIENCY OF EVIDENCE.—In this proceeding for the revocation of the probate of a will on the ground of undue influence, the evidence presented by the contestant falls far short of measuring up to the degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting the issue to a jury; and for these reasons the motion of the respondent for a nonsuit was properly granted.

ID.—UNDUE INFLUENCE—EVIDENCE—WHETHER SUFFICIENT TO WARRANT COURT IN OVERTHROWING WILL.—Courts have neither the right nor the power to overthrow a will on the ground of undue influence, in the absence of direct and substantial proof bringing the case within those well established rules of law which define undue influence, and prescribe the extent to which the evidence in any given case must go in order to measure up to the requirements of such definition.

ID.—WHAT CONSTITUTES UNDUE INFLUENCE IN EXECUTION OF WILL.—Undue influence consists in the exercise of acts or conduct by which the mind of a testator is subjected to the will of the person operating upon it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment.

ID.—TIME AT WHICH UNDUE INFLUENCE EXERCISED.—Courts must refuse to set aside a will upon the ground of undue influence, unless there is proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.

ID.—CONFIDENTIAL RELATION—HUSBAND AND WIFE—PRESUMPTION OF UNDUE INFLUENCE.—Where a wife makes a will in favor of her husband, no legal suspicion of undue influence arises from their confidential relations so as to impose on him the burden of proving that he has not unduly influenced her in making the will; but such relation and the opportunity afforded thereby may be taken into consideration with other evidence to prove undue influence on his part.

ID.—REVOCATION OF PROBATE OF WILL—MOTION FOR NONSUIT—CONSIDERATION OF EVIDENCE.—In considering the evidence before the court

on a motion for nonsuit in proceedings for the revocation of the probate of a will, the entire evidence presented is to be viewed from a point most favorable to the contestant, disregard is to be had of contradictory evidence, all facts supporting the case of the contestant must be taken as true, and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proved in his favor.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Wm. M. Cannon, and Paul C. Morf, for Appellant.

Charles W. Slack, and Walter H. Linforth, for Respondent.

RICHARDS, J.—This is an appeal from an order granting a nonsuit and denying the petition of the contestant and appellant for the revocation of the will of Ida Olive Hodgdon, deceased, and also from an order denying his motion for a new trial.

The petition of the contestant for revocation of the will in question was based upon several grounds, but the only one of these grounds of contest upon which evidence was presented at the trial, and the only ground urged upon this appeal why such will should have been revoked, and why the order granting a nonsuit and denying the petition of the contestant and appellant for its revocation and for a new trial, should be reversed, is the ground of undue influence, claimed to have been exerted by Herbert F. Hodgdon, the husband of said decedent and sole devisee under the terms of said will, in the procurement and execution of the same.

Upon the trial the court granted a motion for nonsuit at the close of the contestant's case; and upon these appeals this court is asked to determine the sufficiency of the contestant's evidence to entitle him to have the case go to a jury upon the sole issue upon which the evidence was presented as above set forth.

The following summary of the evidence, which must be necessarily much compressed in order to come within the

proper limits of an opinion, will serve to show the salient features of this case:

Ida Olive Crooks was the youngest child of Matthew and Susan Crooks; her father died in 1879; her mother died in 1894, when Ida Olive Crooks was just past 21 years of age. Shortly thereafter she married Herbert F. Hodgdon, who was about four years her senior, and who was then and for some time thereafter employed with the real estate firm of Madison & Burke, and who had no property outside of his earnings as an employee of said firm. Some years after her mother's death, Ida Olive Hodgdon came into the possession of an estate aggregating in value about two hundred thousand dollars, of which about sixty thousand dollars was in cash, and of which also there was certain personal property consisting of jewels, laces, rugs, bric-a-brac, and other household effects, including a number of family portraits which had come to her out of her mother's estate and which were of the appraised value of about eight thousand dollars. The rest of the property received from her parents was real estate. There were four other children of Matthew and Susan Crooks, brothers and sisters of Ida, all older than she, who also received their due and respective shares of real and personal property out of their parents' estates. The relation between Mrs. Hodgdon and these two brothers and sisters was always cordial and affectionate, and such also appears to have been in the main the relation between her husband and her brothers and sisters during practically all her married life. For a time after their marriage the young couple lived in a home in San Francisco which had been purchased by her prior to her mother's death, and furnished by her mother, but finally paid for out of her share of her mother's estate. Later Mr. Hodgdon gave up his position with Madison & Burke, and went with his wife to Colorado Springs, where she went for her health, which was always delicate; and from thence to New York and then to Los Angeles; and from thence to a desert resort for those threatened with tuberculosis; and finally to Redlands, where they lived for some time and up to the early part of the year 1902. The marriage between Mr. and Mrs. Hodgdon had been a love match, but this fact did not operate to prevent occasional, and sometimes very bitter quarrels between them, due partly to the fact that Mr. Hodg-

don's habits were at times such as to give his wife much offense and pain, and partly also because of the nervous spells of Mrs. Hodgdon due to the delicate condition of her health. While they were living at Redlands a discord arose between them which led to a temporary separation, Mr. Hodgdon leaving his wife there and coming to San Francisco, where he resumed his position with his former employers. Mrs. Hodgdon shortly followed him, and they became reconciled, going to live at the Hotel Granada in San Francisco. Here also there were occasional discords between the pair, during which on two different occasions the wife left her husband in much anger, and went to the homes of her sisters, through whose good offices on each occasion, however, harmony was restored.

While they were living in Redlands, Mrs. Hodgdon made a will, leaving her husband all her property with the exception of the jewels, laces, rugs, and bric-a-brac which she had received from her mother, and which she bequeathed to her sisters. Shortly after arriving in San Francisco in the early part of 1902, Mrs. Hodgdon visited the office of Joseph C. Campbell, Esq., and there executed another will substantially in the terms of the former one. Neither of these wills was produced in court; but it would seem that in each of them Mrs. Hodgdon had bequeathed to her husband all of her estate except the foregoing items of personal property, valued at eight thousand dollars, either for life or in fee. During the several months which succeeded the making of this (the Campbell) will Mrs. Hodgdon's health was very poor; her nervous state was at times quite serious, and this condition was accentuated both by her quarrels with her husband and by the consciousness that a serious operation was impending. Such operation was in fact performed about September 1, 1902. After the operation Mrs. Hodgdon's health for a time improved, and she lived until November, 1906, when she died quite suddenly at the age of thirty-two years. The will in question bears date August 29, 1902. It is a holographic will written by the testatrix in evident accordance with a form furnished by a lawyer. It is also subscribed by two witnesses, neither of whom was called to testify as to the circumstances under which it was made; in fact, no evidence whatever was presented showing the immediate circumstances

attending the making of the will except possibly the negative proof that Mr. Hodgdon was not present at the time of its execution. The undisputed evidence shows that Mrs. Hodgdon was a woman of bright mind, good education, and a strong will; in fact, the proof makes it quite clear that she was self-willed and independent beyond the average of wives, particularly in the management and control of her property interests and affairs. She kept her own accounts, made her own investments, and handled her own funds in her own name. She consulted with her husband frequently regarding the buying and selling of her property; but in the actual transactions employed her own agents and lawyers and acted in conformity with her own judgment. While the relation between her husband and herself with respect to her properties was intimate and confidential, it nowhere appears by any affirmative proof that the husband at any time made any undue use of this relation to secure an advantage to himself against either her interest or desire; nor is there to be found in the record any proof that in the making of her final will her husband had any part, or exercised any undue or other influence whatever. The relation between Mr. Hodgdon and the two sisters of his wife, who were the chief beneficiaries other than himself under the terms of her former wills, was in the main friendly to the point of cordiality; and the elder of these, Mrs. Morffrew, on more than one occasion during the occurrence of quarrels between Mr. and Mrs. Hodgdon was rather inclined to take the side of the former and to hold her sister to be in the wrong. There is an entire absence of evidence showing either an attempt or desire on the part of Mr. Hodgdon to interfere with or in anywise discourage the cordial and affectionate relation which at all times, both before and after this will was made, existed between his wife and the members of her own family. During the more than four years which intervened between the date of the will in question and the date of Mrs. Hodgdon's death, the undisputed evidence shows that she had every opportunity to change the terms of her said will if she so desired; and while it appears that during that time she spoke frequently of making other wills or of otherwise disposing of her estate, there is no pretense of a showing that she ever carried into effect such a design, or that she was ever in any way prevented from doing so by

the influence of her husband over her mind or intent. The quarrels which Mrs. Hodgdon had with her husband during their married life were only occasional and of temporary duration; and during the intervals between them the relations between husband and wife were affectionate and confidential. She loved her husband to the end; and since they were childless, and since her brothers and sisters were amply provided for in their own respective shares of their parents' properties, it was nothing more than natural that she should leave to her husband whom she loved her entire estate.

The only property really involved in this contest is the jewels, laces, rugs, pictures and bric-a-brac, valued at about eight thousand dollars, which Mrs. Hodgdon had received from her mother with the desire on the latter's part that they should go to her elder daughters in the event of Mrs. Hodgdon's death. It would seem that this had been at times the resolution of the latter, and it is not made clear why this laudable intent was not carried into effect in her final will; but it was not; and there is an utter lack of evidence that any act or influence on the part of her husband operated to divert her mind from that intent.

Courts have neither the right nor power to reframe the wills of decedents, nor to change or overthrow their formally expressed intent as contained therein, in the absence of direct and substantial proof bringing the case within those well-established rules of law which define undue influence, and prescribe the extent to which the evidence in any given case, when viewed from its most favorable aspect to the contestant, must go in order to measure up to the requirements of such definition so as to entitle the case to be submitted to a jury.

In the recent case of *Estate of Ricks*, 160 Cal. 467, [117 Pac. 539], the supreme court defined undue influence to consist "in the exercise of acts or conduct by which the mind of the testator is subjected to the will of the person operating upon it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment"; and in the case of *Estate of Gleason*, 164 Cal. 756, [130 Pac. 872], the same court, in declaring the extent to which the evidence

of a contestant is required to go in order to measure up to this definition, says: "The unbroken rule in this state is that the courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made" (citing *Estate of Carithers*, 156 Cal. 422, 428, [105 Pac. 127]; *Estate of Lavinburg*, 161 Cal. 536, 543, [119 Pac. 915]; *Estate of Kilborn*, 162 Cal. 4, [120 Pac. 762].)

When confidential relations exist between the testator and the beneficiary, involving the elements of mutual affection and obligation such as exist between husband and wife, or parent and child, it has been recently and properly held that "There is no legal suspicion of undue influence arising from the existence of such relationship, which imposes upon the son the necessity, when a will in his favor is being attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will. The confidential relation and the opportunity afforded thereby to exercise undue influence may, of course, always be taken into consideration with other evidence when the question of undue influence is in issue; but the relation itself and the opportunity are not sufficient alone to warrant a finding that undue influence was actually exerted; but there must be some proof, in addition to the relation, of facts and circumstances showing the use of that relation at the time the will was made, overcoming the free will and desire of the testator, in order to invalidate the testament. (*Estate of Ricks*, 160 Cal. 450, 461, [117 Pac. 532]; *Estate of Nelson*, 132 Cal. 182, [64 Pac. 294]; *Estate of Langford*, 108 Cal. 608, [41 Pac. 701]; *Estate of Calkins*, 112 Cal. 296, [44 Pac. 577]; *Estate of McDevitt*, 95 Cal. 17, [30 Pac. 101].)

The foregoing statement of the well settled law of this state defining undue influence, and prescribing the measure and extent of its proof required in the contest of wills to justify the submission of the case to a jury, will suffice to set the standard by which the evidence in this case must be measured and weighed in passing upon these appeals.

The rule is also well established that, in considering the evidence which was before the court at the time a motion for

nonsuit was made and granted, the entire evidence presented is to be viewed from a point most favorable to the contestant; disregard is to be had of contradictory evidence; all facts supporting the case of the contestant must be taken as true, and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proven in his favor. (*Estate of Ricks*, 160 Cal. 450, [117 Pac. 532]; *Estate of Arnold*, 147 Cal. 583, [82 Pac. 252].)

Bearing in mind the foregoing principles and rules of law defining undue influence, and prescribing the requisites of its proof in order to justify the submission to a jury of the issue as to the validity of the will; and approaching the evidence in this case in the spirit of the rule last above quoted, we have carefully examined the evidence herein, not only as contained in the voluminous transcript, but also from the various angles at which the salient features of such evidence have been presented in the able and elaborate briefs and arguments of respective counsel, and we deem it sufficient to say that the evidence presented by the contestant falls far short of measuring up to the degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting the issue to a jury; and that for these reasons the motion of the respondent for a nonsuit was properly granted.

We also perceive no sufficient error in the ruling of the court sustaining the objection of the respondent to certain questions respecting the mental attitude of the decedent toward one of the subscribing witnesses to her will, to justify a reversal; and as to the refusal of the court to require the production and exhibition to the jury of certain personal effects of the decedent, we think its ruling in that regard was a proper exercise of discretion.

The judgment and order denying contestant's motion for a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on January 30, 1914.

[Civ. No. 1263. First Appellate District.—December 4, 1913.]

**JENNIE COLEMAN, Appellant, v. JOHN L. COLEMAN,
Respondent.**

DIVORCE—RESIDENCE OF PARTIES—SUFFICIENCY OF FINDING.—A finding in an action for divorce that both the plaintiff and the defendant have been residing in the county and state for a period of more than one year "now last past" is not a finding that they or either of them have resided within the jurisdiction for one year next preceding the commencement of the action, and is not sufficient to sustain a decree of divorce.

ID.—RESIDENCE OF PARTIES—JURISDICTIONAL FACTS—PLEADING AND PROOF.—No divorce can be had unless this jurisdictional fact appears, that the plaintiff has been a resident of the state for one year, and of the county three months, next preceding the commencement of the action, and proof thereof is a prerequisite to the granting of the divorce. A mere admission in the pleadings of such residence is insufficient; the plaintiff must aver and prove that he or she has been a *bona fide* resident for the requisite period.

ID.—NONRESIDENT—CROSS-COMPLAINT—RIGHT TO RELIEF.—The amendment of 1911 to section 128 of the Civil Code, providing relief for a cross-complainant in divorce who is not a resident of the state, or of the county in which the action is brought, is not broad enough to entitle him to affirmative relief, unless proof is offered that the plaintiff has resided in the jurisdiction for the requisite period.

ID.—MOTION FOR NEW TRIAL—NATURE OF AS INDEPENDENT PROCEEDING. A motion for a new trial is in the nature of a new and independent proceeding collateral to the judgment in the action.

ID.—NOTICE OF MOTION—FAILURE TO FILE IN TIME—RELIEF UNDER SECTION 473 OF CODE OF CIVIL PROCEDURE.—Where notice of intention to file a motion for a new trial is not given within the time limited, the trial court has no power, under the terms of section 473 of the Code of Civil Procedure, to relieve the defeated party from the consequences of that failure.

ID.—APPEAL BY WIFE—COSTS AND COUNSEL FEES.—Where a wife in good faith takes an appeal from a judgment denying her a divorce, and is without means to prosecute it, but her husband is financially able to defray the expense thereof, it is an abuse of discretion for the trial court to refuse to make her a reasonable allowance for costs and counsel fees.

ID.—APPEAL—INSUFFICIENT FINDINGS AS TO RESIDENCE.—Where, upon an appeal from a judgment on the judgment-roll in an action for divorce, a reversal is necessary because of the insufficiency of the

finding as to the residence of the parties, it is proper to direct the making of a new finding on such subject, and to provide that upon it and the remaining findings the appropriate judgment be rendered and entered.

ID.—REMAND OF CASE—NEW FINDINGS UPON SINGLE ISSUE.—A case may be remanded with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from orders refusing leave to file notice of new trial and denying alimony and costs. William P. Lawlor, Judge.

The facts are stated in the opinion of the court.

W. H. Early, and G. L. Baraty, for Appellant.

T. J. Crowley, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment denying a divorce to plaintiff, and granting a divorce to defendant on his cross-complaint. There is also an appeal from the two orders made by the court after the entry of the interlocutory decree of divorce, the first order being one denying plaintiff permission to file notice of intention to move for a new trial after the time for the filing of such notice had expired, which relief was sought under the terms of section 473 of the Code of Civil Procedure; and the second order being one denying plaintiff alimony, costs, or counsel fees pending appeal.

It is claimed by the appellant that the interlocutory decree of divorce which was granted to the defendant upon his cross-complaint, is not sustained by the findings of fact. In support of this claim we are referred to the finding as to the residence of the parties. That finding recites that plaintiff and defendant are both residents of the city and county of San Francisco, state of California, and "have been residents in said city and county and state for a period of more than one year now last past."

We agree with appellant that this is not a finding that the parties had resided in San Francisco for that period of time prior to the commencement of the action.

Section 128 of the Civil Code provides that no divorce shall be granted unless the plaintiff shall have been a resident of the state of California for a period of one year, and of the county in which the action is brought for a period of three months, next preceding the commencement of the action. No divorce can be had unless this jurisdictional fact appears, and the proof thereof is a prerequisite to the granting of the divorce. A mere admission in the pleadings of such residence is insufficient. A plaintiff in a divorce case must aver and prove that he or she has been a *bona fide* resident for the requisite period. (*Bennett v. Bennett*, 28 Cal. 600; *Dutcher v. Dutcher*, 39 Wis. 651, 667; *Smith v. Smith*, 10 N. D. 219, [86 N. W. 721]; *Adams v. Adams*, 154 Mass. 295, [13 L. R. A. 275, 28 N. E. 260].)

While the section last mentioned was amended in the year 1911 so as to provide for relief for a cross-complainant who is not a resident of the state, or the county in which the action is brought, yet, under the amendment the section is not broad enough to entitle such complainant to affirmative relief unless proof is offered that the plaintiff has resided in the jurisdiction for the requisite period.

Without proof at the trial that one of the parties to the action had resided in the state and county for the necessary period, the court can never acquire jurisdiction to grant a divorce to one or other of the parties. The fact of residence being a jurisdictional prerequisite, it must appear affirmatively in the findings that the plaintiff or defendant has resided in the jurisdiction for the specified period; and failing in this the judgment thereon is void. (*Salzbrun v. Salzbrun*, 81 Minn. 287, [83 N. W. 1088].)

A finding as here that both plaintiff and defendant have been residing in the county and state for a period of more than one year "now last past" is not a finding that they or either of them had resided within the jurisdiction for one year next preceding the commencement of the action; nor does the record, aside from the pleadings, anywhere disclose that either of them so resided there for the statutory period.

The complaint was filed on the twelfth day of July, 1911, the cross-complaint on the sixteenth day of August, and the findings of fact together with the decree based thereon were signed by the judge on August 30th of the same year. It

follows that the finding of residence of the parties is insufficient to support the decree.

As to the appeal from the order denying plaintiff permission to file a notice of intention to move for a new trial, it is sufficient to say that the motion was eighty-three days late, and that the provisions of section 473 of the Code of Civil Procedure, do not apply to such a motion. A motion for a new trial, says the supreme court, is in the nature of a new and independent proceeding collateral to the judgment in the action; and where notice of intention to file a motion for a new trial is not given within the time limited, the trial court has no power under the terms of section 473 of the Code of Civil Procedure, to relieve the defeated party from the consequences of that failure. (*Union Collection Co. v. Oliver*, 162 Cal. 755, [124 Pac. 435].)

Coming to the last order appealed from, we think the court committed error in denying plaintiff's motion for costs and counsel fees on appeal. From what has already been said it appears that the appeal from the judgment must be regarded as having some merit; and, according to plaintiff's affidavit (which was uncontroverted), that appeal was taken in good faith, she was without means to prosecute it, and her husband was in a position financially to pay a reasonable sum to defray that expense. Of course the court was right in refusing to make her an allowance for the purpose of having the testimony transcribed, for it was obvious that the appellant had by delay lost all right to have the appellate court review the evidence. But so far as the appeal from the judgment on the judgment-roll alone was concerned, it is plain for the reasons just stated that the refusal to make her a reasonable allowance to prosecute that appeal was an abuse of discretion.

The appeal from the judgment is brought here on the judgment-roll alone, and we do not therefore know what the evidence was in the trial court. The plaintiff alleged a residence of eight years within the city and county of San Francisco next preceding the commencement of the action, which was not denied in the answer; the cross-complaint also alleged the residence of the parties for the necessary jurisdictional period; and while jurisdiction cannot be established by an admission of the parties, still from what appears in the record and the briefs of counsel it is probable that the jurisdiction

of the court was fully established, and that the language of the finding was an attempt to show such jurisdiction. The authorities support the view that a case may be remanded with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record. (*Duff v. Duff*, 101 Cal. 1, 4, [35 Pac. 437]; *Argenti v. City of San Francisco*, 30 Cal. 459, 462.) We think that this is a proper case in which to adopt such course; and that on account of the defective finding as to the residence of the parties the judgment should be reversed, and the cause remanded to the trial court, with directions to said court, upon the evidence before it, to make a new finding on the subject of the residence of the parties; and upon such and the remaining findings to render and enter the appropriate judgment.

The order denying plaintiff's motion for permission to file notice of intention to move for a new trial is affirmed; the order denying plaintiff's motion for costs, counsel fees, and alimony pending appeal is reversed; and the judgment is reversed, and the cause remanded to the trial court for further proceedings in accordance with the views herein expressed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1164. Third Appellate District.—December 4, 1913.]

MARCELLUS KRIGBAUM, Appellant, v. ANDREA SBARBARO et al., Respondents.

MONOPOLIES—CARTWRIGHT ANTI-TRUST LAW—COMBINATION TO PREVENT BROKER FROM EFFECTING SALE OF LAND—SUFFICIENCY OF COMPLAINT FOR DOUBLE DAMAGES.—In an action by a real estate broker against the stockholders of a bank for double the amount of damages alleged to have been sustained by him by their acts in preventing him from consummating the sale of certain real property devoted to the growing of wine grapes, a complaint alleging that the defendants combined together, in violation of the Cartwright anti-trust law (Stats. 1907, p. 984; Stats. 1909, p. 953) for the purpose of securing and maintaining a monopoly of the wine industry and of lands suitable to the growing of wine grapes in the state, and that they determined

to destroy the plaintiff's business, by reason of his having preferred charges against the bank to obtain its expulsion from a certain real estate board, and that they coerced the bondholders' committee of a certain vineyard corporation, who had employed the plaintiff to sell certain land, to refuse to conclude a sale negotiated by the plaintiff through his agency, does not state a cause of action under the Cartwright Act.

ID.—CHARACTER OF TRANSACTION—INJURY NOT DIRECTLY RESULTING FROM MONOPOLY.—It is manifest from the circumstances of the transaction complained of as divulged by the complaint that the injury, if any, sustained by the plaintiff in such transaction did not occur as the direct result of the restrictions in trade or commerce which it is charged are being maintained by the alleged trust or combination, but must have been directly occasioned, if at all, by the wrongful acts either of the trust itself, as a corporate entity, not acting within the scope of the purposes of its organization, or by the defendants, as individuals, combined together, it may be, for that express purpose.

ID.—INTERPRETATION OF CARTWRIGHT ACT—INJURY TO BUSINESS OR PROPERTY.—Injury in business or property within the contemplation of section 11 of the Cartwright anti-trust law providing that any person injured "in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful" by such act, may recover two-fold damages, arises where the injury has directly resulted from the fact of the existence of the trust, that is, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. One whose business or property has been injured cannot maintain an action under such law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination.

ID.—ALLEGATIONS AS TO TRUST—MATTERS OF INDUCEMENT.—The averments in such complaint as to the alleged trust are wholly immaterial to the gist of the complaint,—namely, the wrongful acts whereby the defendants, having combined and conspired together for that purpose, but not as a trust or combination in restraint of trade, caused the committee to break its contract with the plaintiff. At best such averments can be regarded as nothing more than matter of inducement, explanatory to some extent, perhaps, of the gist of the complaint.

ID.—COMPLAINT—SUFFICIENCY OF STATEMENT OF TORT.—While such complaint is not good under the anti-trust act, it sufficiently states an actionable wrong against the defendants to fortify the pleading against the force of a general demurrer, and the measure of damages is the actual detriment he has suffered by reason of the wrong.

Id.—PURCHASER READY AND ABLE—ALLEGATION CONCERNING.—It is not necessary for the plaintiff in such action to allege that at the time the sale was prevented he had procured a purchaser, ready, willing, and able to purchase for the amount and upon the terms prescribed, where it appears that the only step necessary to the procurement was in concluding the negotiations, that is, in consummating or crystallizing the negotiations into an agreement.

Id.—EXCLUSIVE RIGHT OF BROKER TO SELL—ALLEGATION REGARDING.—Nor is it necessary to allege that the plaintiff had the exclusive right to sell the property during the life of his contract, or that the committee in its contract with him did not reserve to itself the right to make a sale within that time.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A Sturtevant, Judge.

The facts are stated in the opinion of the court.

Heim Goldman, for Appellant.

D. Freidenrich, for Respondents.

HART, J.—This is an appeal from a judgment entered upon an order sustaining a demurrer to the second amended complaint, without leave to amend.

The demurrer is both general and special, and thus the complaint is challenged not only for want of sufficient facts, but upon the ground that it is ambiguous, uncertain, and unintelligible.

The object of the action is to obtain judgment for damages alleged to have been inflicted upon the plaintiff by the defendants by wrongfully and fraudulently, so it is charged, preventing him from consummating the sale of certain real property, devoted to the growing of wine grapes, for which sale the owner of said property agreed to pay him, as compensation, the sum of twenty-five thousand dollars.

The complaint, which is a voluminous pleading, first alleges that the plaintiff has been, for many years prior to, and was, at the time of the commencement of this action, engaged in the business of buying, selling, and dealing in real estate, in this state; that the defendants are and for a long time have been stockholders in the Italian-American Bank, a corpora-

tion engaged in the banking business in the city of San Francisco; that both said bank and the plaintiff were members of the San Francisco real estate board; that, while the plaintiff was a member of said board, he preferred charges against the said bank and asked that said bank be expelled from membership of said board.

The complaint then, with much particularity and detail, and substantially following the material language of the provisions of the state anti-trust law, known as the "Cartwright Act" (Stats. 1907, p. 984; amended; Stats. 1909, p. 593), proceeds to charge that, prior to September 1, 1910, the defendants, in defiance of the provisions of said anti-trust law, "combined and confederated themselves together and organized a trust and combination for the purpose of dominating, controlling and regulating the wine industry in California and also the business of raising, treating, storing, distilling, and handling grapes and the products thereof in the state of California, and also for the purpose of dominating, controlling, and regulating the purchase and sale of vineyards and lands producing and capable of producing grapes within the state of California and which said trust has ever since been continued by them; . . . ; that it is a combination by which the defendants have combined their capital, skill, acts and influence for the purpose of creating and carrying out restrictions in trade and commerce." In short, it is alleged that the defendants have combined together for the purpose of securing and maintaining a monopoly of the wine industry and of lands suitable to the growing and cultivation of wine grapes in California, and to so manage and conduct such combination or trust as to make it impossible for independent wine growers to compete in the sale of wines and thus and thereby prevent free and unrestricted competition in the manufacture and sale of wines in the state of California.

The gist of the complaint is then set out, in substance as follows, borrowing the synoptical statement thereof contained in the brief of the respondents: "That (as before shown) the bank was an associate member of the San Francisco real estate board, of which board plaintiff was an active member, and that plaintiff preferred charges against the bank and asked that it be expelled from membership in the board; that this greatly angered and provoked defendants and they there-

upon determined to oppress, boycott, harass, and ruin plaintiff, to destroy his business, prevent him from making sales to purchasers and prevent prospective purchasers from dealing with him; that to carry out this purpose, they mutually agreed and bound themselves to boycott plaintiff, to injure and destroy his business, prevent him from acting as agent or broker in the purchase or sale of real property or from carrying on his real estate business or from earning any money from his business; that plaintiff was employed by the Bond Holders' Committee of the California Consolidated Vineyard Co., a corporation, as broker, to sell certain described vineyards; that as such broker, plaintiff offered the property for sale to the California Wine Association, which association considered it favorably and was about to conclude a deal for the purchase of the property when defendants learned of the negotiations; that thereupon they intimidated and coerced the bondholders' committee to sell the vineyards to the individual defendants directly or to the companies controlled by them and not through the agency of plaintiff; that the bondholders' committee sold the vineyards to the defendant California Wine Association for the price and upon the terms fixed by the defendants; that the sale was made ostensibly to the California Wine Association but in fact the vineyards were purchased by the defendants and the title thereto was vested in the Italian-Swiss Colony; that this was done for the purpose of concealing the real transaction and of defrauding the plaintiff out of his commission; that the bondholders' committee secretly agreed with the defendants to allow the title to the vineyards to ostensibly vest in the Italian-Swiss Colony, although the property in fact passed to the California Wine Association; that the sale was manipulated so as to make it appear that it was consummated after the expiration of plaintiff's agreement, whereas in fact everything concerning it was arranged and agreed upon before the expiration of the time."

Although the plaintiff avers that the actual loss or detriment suffered by him by reason of the alleged wrongful acts of the defendants amounted to the sum of twenty-five thousand dollars, he nevertheless states in his complaint "that, by virtue of the statute in such cases made and provided the plaintiff is entitled to recover twice the amount of damages

sustained by him, namely, the sum of fifty thousand dollars," for which amount he prays judgment.

It is conceived that the complaint states a cause of action against the defendants.

The actual damage sustained by the plaintiff, by reason of the alleged acts of the defendants, was, according to the complaint, the sum of twenty-five thousand dollars; but it appears that the plaintiff conceived that he had a cause of action against the defendants by reason of the acts of which he accuses them, based upon an alleged violation, by the defendants, of the provisions of the so-called Cartwright anti-trust law. This is clearly to be inferred from the fact that the complaint charges the defendants with having organized themselves into a combination whose purpose is to prevent free and unrestricted competition in the business of manufacturing and selling wines in California, and from the further fact that, evidently, in pursuance of section 11 of the Cartwright Act, he asks for double the damages alleged to have been actually sustained by him, said section of said act providing that any person injured "in his business or property by any other person or corporation or association or partnership, by reason of anything forbidden or declared to be unlawful by this act, may sue therefor . . ., without respect to the amount in controversy, and to recover twofold the damages by him sustained," etc.

It is very clear, however, that the complaint does not state a cause of action in favor of the plaintiff under the provisions of the anti-trust law. The averments involving the charge of an unlawful combination by the defendants contrary to the provisions of the anti-trust law merely disclose, if anything at all, that a trust has been organized by the latter for the purpose of preventing free and unrestricted competition in the wine industry in this state. It is true that it is declared that one of the objects of the alleged combination is to dominate and control "the purchase and sale of vineyards and lands producing and capable of producing grapes within the state of California," but this is a mere incident—an important one, it may be conceded—of the central purpose of the alleged trust, viz.: to control the entire wine industry of the state. There is nothing to show, if indeed, such a showing were possible under the anti-trust act as to that line of

business, that the defendants had confederated together for the purpose of preventing free and unhampered competition in the general business of buying and selling real estate (the business in which the plaintiff is engaged), and hence it cannot be said that the alleged trust or combination, by reason of its existence as such, had, in any manner, injured the plaintiff in "business or property," within the meaning of the provisions of the anti-trust act. To be "injured in business or property," within the contemplation of said law, as we understand it, is where the injury has *directly* resulted from the fact of the existence of the trust—that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination. So, in the case at bar, it is manifest from the circumstances of the transaction complained of as divulged by the complaint that the injury, if any, sustained by the plaintiff in said transaction did not occur as the direct result of the restrictions in trade or commerce which it is charged are being maintained by the alleged trust or combination, but must have been directly occasioned, if at all, by the wrongful acts either of the trust itself, as a corporate entity, not acting within the scope of the purposes of its organization, or by the defendants, as individuals, combined together, it may be, for that express purpose. It follows that the averments as to the alleged trust are wholly immaterial to the gist of the complaint or the essential ground upon which the plaintiff must rely for a recovery, viz.: the wrongful acts whereby the defendants, having combined and conspired together for that purpose, but not as a trust or combination in restraint of trade, caused the bondholders' committee to break its contract with him.

At best, from the standpoint of pleading, said averments can be regarded as nothing more than matter of inducement, explanatory to some extent perhaps of the gist of the complaint.

It now remains to be seen whether the complaint states a cause of action against the defendants as individuals or as members of the unlawful trust above referred to and in favor of the plaintiff.

According to the complaint, the plaintiff, by his contract with the committee was employed and authorized, as its agent and broker, to sell for it within the period covered by the months of August, September, and October, 1910, certain lands or vineyards. As shown, it is alleged that, during the period of time just mentioned, the plaintiff "submitted the sale of said vineyards to the California Wine Association and said . . . association considered favorably the offer of plaintiff for the sale of said vineyards and was anxious to purchase the same and was about to conclude a deal for the purchase of said properties," when the defendants, having heard of said negotiations, wrongfully interfered with and prevented the sale being made through the agency of the plaintiff, in the manner as described by the succeeding averments.

The fair, reasonable, and rational inference from the foregoing averments and the averments following is that the plaintiff had persuaded the California Wine Association to purchase the properties, that said association had fully decided to purchase them and was ready and prepared to enter into an agreement to that end, when the defendants, by wrongful means—threats, intimidation, and coercion—compelled the committee to refuse to effect such sale through the agency of plaintiff and thereby prevented the latter from carrying out and executing the deal with said association. If this be true (and the demurrer admits the verity of the vital allegations of the complaint), then, in our judgment the defendants were guilty of an actionable wrong against the plaintiff. But the defendants contend that, in order to have stated a cause of action, the plaintiff must have disclosed by his complaint that, at the time the defendants are alleged to have interfered with said negotiations and thus prevented the sale from being consummated through the instrumentality of the plaintiff, he had *procured* in said association a purchaser of

said properties ready, willing, and able to purchase the same for the amount and upon the terms prescribed by said committee. We do not agree with this contention. While we do not think that it may be inferred from the complaint that the plaintiff had, strictly speaking, *procured* a purchaser ready, willing, and able to purchase the properties, it is, as before stated, clear from the averments that he was, when interfered with by the defendants, conducting negotiations with a party ready, willing, and able to purchase, and that the only other step necessary to the *procurement* of such a purchaser was in *concluding* the negotiations—that is, in consummating or crystallizing the negotiations into an agreement. This, the complaint plainly states, would have been accomplished but for the wrongful acts of the defendants in preventing the committee from making the sale through the plaintiff and herein lies the tort of the defendant from which the damage suffered by the plaintiff ensued. That, in point of fact, the wine association was ready, willing, and able to purchase the properties, is shown by the statement in the complaint that it did, subsequent to its negotiations with the plaintiff, purchase the same.

Nor, as the defendants contend is true, was it necessary to show that the plaintiff, during the months of August, September, and October, 1910, had the exclusive right to sell the properties, or that the committee did not, in its contract with the plaintiff, reserve to itself the right to sell said properties during the life of the plaintiff's contract. If the committee had conferred upon a dozen different brokers like authority, each contract covering precisely the same period, and one of the brokers had succeeded in persuading some party to purchase the same upon the terms stipulated by the principal, and, when the broker was about to consummate the deal, a third party, by unlawful methods or means, had prevented the consummation of the deal through such broker, the latter would have his right of action against the tort-feasor, notwithstanding that other brokers were vested with authority to sell the same properties during the same period of time. In other words, merely because several brokers had equal authority to procure for the owner a purchaser of the same property during the same period of time would give no one the right wrongfully to interfere with a sale of such property

which one of the brokers was about to make. And, of course, the same proposition is no less true as to the owner of the property where he reserves the right to sell the property himself during the life of the contract with his broker. These propositions are too self-evident to require the citation of authorities to substantiate them.

Our conclusion is: That the complaint is not and cannot, from its nature, be based upon the Cartwright anti-trust act, but that the plaintiff has sufficiently stated an actionable wrong against the defendants to fortify the complaint against the force of a general demurrer, and that the measure of damages in such case is, obviously, the actual detriment he has suffered by reason of said wrong.

The judgment is reversed, with directions to the court below to overrule the general demurrer.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1136. Third Appellate District.—December 4, 1913.]

MERTIE C. TRIMBLE, Respondent, v. S. W. HELLAR,
Appellant.

WATERS AND WATERCOURSES—AMOUNT OF APPROPRIATION—HOW DETERMINED.—Priority in the use of waters and the capacity of the ditch through which they are diverted do not necessarily establish the extent of the right. The true test is the amount of water actually used for beneficial purposes.

ID.—MEASURE OF APPROPRIATOR'S RIGHT—AMOUNT OF WATER ACTUALLY USED OR NEEDED.—The appropriator's right is measured by what he in fact uses for some useful or beneficial purpose, not what he might have used; and if the capacity of the ditch is greater than is necessary to irrigate his lands, he will be restricted to the quantity of water needed for purposes of irrigation, watering stock, and domestic purposes.

ID.—IRRIGATION—RIGHT TO ENLARGE USE OF WATER.—Where the purpose for which water is appropriated is the irrigation of land, the appropriator is not confined to the amount first used, but is entitled to such further amount of water, within the capacity of his ditch, as will be required for future improvement of his land, if

the right is otherwise kept up; but this right to enlarge the use may be lost by nonuser for a long period of time, and the appropriation of the water meantime by others.

ID.—AMOUNT OF APPROPRIATION—CIRCUMSTANCES INDICATING.—In determining the amount of water to which a claimant is entitled, the acts and conduct of the first appropriator at the time of his appropriation, his object in making the appropriation, the quantity of land capable of irrigation, the necessity for irrigation, together with his actual appropriation and use, must be considered.

ID.—ACTION TO DETERMINE CONFLICTING WATER-RIGHTS.—In this action to determine conflicting claims to the waters of Kerlin Creek, in Trinity County, it appears that the defendant never did, either by the acts of his predecessors in interest or by his own acts, acquire a right to a greater quantity of the waters of the creek than that allowed him in the judgment, that is, one-half thereof.

ID.—JUDGMENT—NECESSITY OF DEFINITELY FIXING QUANTITY OF WATER—EQUITABLE DIVISION.—The failure of the court in such action to indicate definitely in its judgment the quantity of water to which each party is entitled is not objectionable where it appears that the flow of the stream is shown to vary greatly at different seasons of the year, that for a long period of the time the claimants have used substantially the same quantity and found it sufficient for their purposes, and that there have been no other users.

ID.—WATER-RIGHT—GRANT BY IMPLICATION.—Where a water-right is appurtenant to land, it passes with a conveyance of the land, irrespective of whether the deed, in terms, conveys the "appurtenances."

ID.—APPROPRIATION—NOTICE AS DETERMINING QUANTITY OF WATER.—Where an appropriator of water posts a notice of his claim to an amount of water in excess of what he appropriates, this will not affect the rights of other appropriators. His right is not measured by the extent of his appropriation as stated in the notice, or by the actual diversion from the stream, but by the extent to which he applies the waters for useful or beneficial purposes.

APPEAL from a judgment of the Superior Court of Trinity County. James W. Bartlett, Judge.

The facts are stated in the opinion of the court.

Scrivner & Montgomery, for Appellant.

H. R. Given, and John S. Reid, for Respondent.

CHIPMAN, P. J.—This is an action to determine the conflicting claims of plaintiff and defendant to the waters of a

certain creek known as Sam's Creek or Kerlin Creek, in Trinity County. It appears that this creek carries at flood season quite a large quantity of water, more than either party ever used or had use for, but the quantity rapidly diminishes, after the rainy season is passed, to a flow, during the months of August and September, of not to exceed thirty miner's inches. Both parties are owners of ranches to which water from this creek was conveyed by ditches constructed by their predecessors in estate more than twenty years prior to the commencement of this action. The ditch leading to plaintiff's land, or the Trimble Ranch, is known as the Trimble ditch and that leading to defendant's land, or the Kerlin Ranch, as the Kerlin ditch. There is some conflict as to the carrying capacity of these ditches but there was evidence that the Trimble ditch would convey about one hundred miner's inches of water and defendant's ditch about one hundred and forty-four miner's inches. The evidence was that defendant's ditch was first in time.

Plaintiff claims a right to one hundred miner's inches of the waters of said creek for irrigating and domestic purposes and alleges such use thereof for over twenty years; she alleges the destruction by defendant of her dam erected on said creek at the head of her ditch whereby she was damaged five hundred dollars and was deprived of the use of said waters, and prays for an injunction to restrain defendant from interfering therewith.

Defendant denied plaintiff's right as to the waters of said creek, admitted destroying the dam of the Trimble ditch and, by cross-complaint, alleged the ownership as a first right to the waters of said creek to the extent of one hundred and forty-four miner's inches for irrigating and domestic purposes. By an amendment to her complaint plaintiff alleged that the said creek affords sufficient water if properly conserved and used, to irrigate both the Trimble and Kerlin places and this is denied by defendant. No question of riparian rights arises. Plaintiff's dam, at the head of the Trimble ditch, is two or three hundred yards above the dam at the head of defendant's ditch.

Findings numbered 1, 2, 4, 5, 6, 7, 8, 9, 11, 17, 18, 19, and 20 are challenged as unsupported by the evidence. The facts found and challenged may be thus summarized: That plain-

tiff is the owner of the so-called Trimble ditch, conveying water to plaintiff's premises, and also appurtenant to said ditch, one-half of the water flowing in said Sam's Creek at the point where the dam of the Trimble ditch is situated, to the extent of not exceeding one hundred miner's inches of water (I); that plaintiff and her predecessors have been the owners of said ditch and water, except when interfered with by defendant as herein specified, for more than twenty years last past (II); that said ditch and water as specified in finding I are appurtenant to said Trimble Ranch and have so been for the past twenty years, and, except as already stated, have been used for irrigation, household, domestic, and other beneficial purposes (IV); that, about August 23, 1908, and divers times since, defendant wrongfully destroyed plaintiff's dam and diverted said water from plaintiff's said ditch (V); by reason whereof plaintiff has been unable to obtain water for household purposes or to irrigate her said ranch as she was accustomed to do and her crops thereon have dried up and been lost (VI); said loss was of the third crop of each of the three years immediately preceding the commencement of the action, of the value of one hundred and fifty dollars (VII); and defendant threatens to continue to so divert the said water (VIII) and such act will, if continued, cause plaintiff irreparable injury to her estate (IX); and the use of said water by plaintiff and her predecessors has not been subject to defendant's first right to one hundred and forty-four inches of said waters or any thereof (XI); that plaintiff claims an interest in and right to said waters of said creek adversely to defendant and the same is not without right but is an estate and interest as specified in finding I (XVII); that plaintiff is now and for more than twenty years last past she has been, through her predecessors in interest, the owner of the right to the waters of said creek as specified in finding I, which said waters were at all times during said period conveyed through said ditch to plaintiff's said ranch and used thereon for beneficial purposes, except when interfered with by defendant as hereinbefore set forth (XVIII); that during said last named period plaintiff has by her grantors and predecessors claimed, used, and possessed said water-right set forth in finding I and during said period said right and said ditch have been appurtenant to said ranch, and said waters have

been used thereon all said time except when diverted by defendant as hereinbefore found, and such use has been adverse to the right of defendant and his predecessors in interest (XIX); and open, notorious, exclusive, and adversely to defendant and all other persons (XX). The foregoing findings relate to plaintiff's rights and interests. As to defendant's rights the court found: That defendant has not been and is not now the owner of the first right to said waters to the extent of one hundred and forty-four inches, but for the past thirty years he and his predecessors in interest have been and he now is the owner of one-half of the waters flowing in said creek at the point where the said Trimble dam is situated and any waters coming into said creek between said Trimble dam and defendant's dam to the extent of one hundred and forty-four inches measured under a four-inch pressure (X); that the right found in finding X is the only right defendant now has or his predecessors ever had to the waters of said creek (XII); and defendant and his predecessors have not used and defendant is not now using said waters for any beneficial purpose, openly, notoriously, exclusively, or adversely to plaintiff's right, and defendant's and his grantors' use has been only of that portion of said waters as in finding X set forth (XVI).

Finding XXI is as follows: "That there is sufficient water in Sam's Creek (also known as Kerlin Creek) during the irrigating season of each year to supply both the plaintiff and defendant with sufficient water each for irrigating, domestic, and other useful and beneficial purposes, provided the same be properly conserved."

As conclusions of law the court found: That plaintiff is the owner of the ditch mentioned in finding I and "of one-half of the waters flowing in Sam's Creek mentioned in finding No. 1, at the point thereon where the dam of the said Trimble ditch is situated to an extent not exceeding one hundred inches measured under a four-inch pressure" and that said ditch and right to the waters of said creek are appurtenant to said Trimble Ranch. "Defendant is the owner of one-half of the waters flowing in said Sam's Creek at the point thereon where the dam of said Trimble ditch is situated, and any additional waters coming into said stream between the said Trimble dam and the defendant's dam, to

an extent not exceeding one hundred and forty-four inches measured under a four-inch pressure." The following direction is also given: "That plaintiff, shall provide and install at the point on Sam's Creek, where the said Trimble ditch is situated, such proper and necessary appliances as will divert from said Sam's Creek at that point, one-half of the waters flowing in said creek at that place to an extent not exceeding one hundred inches measured under a four-inch pressure, and permit the other half of the water of said creek at that point to flow down the said creek in order that it may reach the dam of defendant at the head of Kerlin ditch." It is also found as conclusion of law that plaintiff is entitled to recover damages in the sum of one hundred and fifty dollars and costs of suit and is entitled to an injunction perpetually enjoining defendant from diverting from said Sam's Creek, at the point designated, "more than one-half of the waters flowing in said Sam's Creek at said point, and from in any way interfering with the said Trimble ditch and plaintiff's right to the waters of Sam's Creek as specified in finding No. 1 and her use thereof." Judgment was accordingly entered in favor of plaintiff. Defendant appeals from the judgment and brings the record here under the alternative method.

It would greatly and unnecessarily prolong this opinion to quote the evidence. There is considerable conflict upon some phases of the case, but a careful reading of the record satisfies us that the following statement of the learned trial judge, taken from his written opinion certified up to us, is fully justified. We quote: "The evidence shows that the Trimble ditch was constructed in 1883 by the predecessors in interest of the plaintiff, and that thereafter during every year until 1908 the waters from Sam's Creek were diverted through it upon the Trimble place and there used for domestic and irrigating purposes; that the Kerlin ditch was constructed prior to the Trimble ditch, and used each year thereafter in conducting water for irrigating and domestic purposes to and upon the Kerlin place; that in the spring of each year a dam was placed in Sam's Creek at the head of the Trimble ditch to divert the water into the Trimble ditch, and that until 1904 the waters of Sam's Creek were diverted into the Kerlin ditch by means of a head box placed in the spring of

each year at the head of the ditch and connecting it with the stream.

"At the commencement of the year 1904 both the Trimble and Kerlin places were being cultivated to about the same extent, from five to eight acres at each place, the crops raised being of similar character, save for alfalfa, of which there was more in cultivation on the Trimble place than on the Kerlin place at that time. None of the parties who at this time owned or occupied the places had ever had any trouble over the waters of Sam's Creek, and both had had, notwithstanding some crude and wasteful methods of appropriation and use, as disclosed by the evidence, an ample sufficiency of water for irrigation and domestic purposes upon both places.

"In the spring of 1904 one B. F. Russell became the purchaser of the defendant's premises, then commonly known as the Kerlin place, and thereafter and before transferring the same to defendant said Russell repaired the flumes and dam of the Kerlin ditch, and cleared up and put under cultivation and prepared for irrigation several acres of land additional to those formerly cultivated and cropped by the owners and occupants of the Kerlin place, much of this newly cultivated land being seeded with alfalfa, a crop which in its early stages requires a considerable amount of irrigation.

"During 1905 the Kerlin place was under a lease to one W. J. Henry, who personally conducted the farming operations thereon from April 16th to November 10th of that year. Since the expiration of the Henry lease the defendant has owned and cultivated the Kerlin place. . . . Prior to the purchase by Russell of the Kerlin place but little alfalfa had been grown thereon, the usual crops having been grain, hay and fruit and garden vegetables.

"To properly solve the matters in controversy between the parties requires mainly the determination of this question: To what extent had the waters of Sam's Creek been appropriated and used by plaintiff and the predecessors of defendant at the time of the purchase of the Kerlin place in 1904 by B. F. Russell through whom defendant derails his title, so as to give the parties to this action a fixed right to some certain portion of the waters of said stream? Prior to this time, and for over five years prior to the purchase of the Kerlin place by Russell, the evidence shows an open, peace-

able, notorious use of waters from the stream upon both the Trimble and Kerlin places, for useful and legitimate purposes, under claim of right, and without dispute or interference. During this long period of at least sixteen years, all the evidence substantially shows that the stream afforded sufficient water for the irrigation of about the same amount of lands and crops on both the Trimble and Kerlin places. And that there was sufficiency of water for an increased irrigable acreage in both places if properly conserved is plainly evident from the testimony of the witness Henry who cultivated the Kerlin place after its cultivated acreage had been increased and character of crops raised thereon changed, and who by a mutual arrangement with the husband of the plaintiff, such as neighbors should more often adopt and prevent actions like this from arising, enabled the raising and harvesting of the crops on both places during 1905 without loss or injury to either party."

Much of the criticism of the instructions rests, we think, upon a misconception of defendant's right to wit: that the capacity of his ditch determines the extent of his right to the water.

It is true that defendant's ditch was first in time as was the use of the waters of Sam's Creek by means of this ditch. It is true also that the ditch had a capacity of one hundred and forty-four miner's inches of water. But priority in the use of these waters and the capacity of the ditch do not necessarily establish a right to one hundred and forty-four miner's inches of the water. The size of the ditch is a factor in aid of the intention of the party making the appropriation of the water. It is not, however, conclusive. The true test is the amount of water actually used for beneficial purpose. Section 1411 of the Civil Code provides that "The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." So, also, is it true that the appropriator's right is measured by what he in fact uses for such a purpose, not what he might have used. If the capacity of the ditch is greater than is necessary to irrigate the lands of the appropriator he will be restricted to the quantity of water needed for the purposes of irrigation, water-stock, and domestic purposes. Where the purpose is

the irrigation of land he is not confined to the amount used, but is entitled to such further amount of water, within the capacity of his ditch, as would be required for future improvement of his land, if the right is otherwise kept up. But this right to enlarge the use may be lost by nonuser for a long period of time and the appropriation of the water meantime by another appropriator. The acts and conduct of the first appropriator at the time of his appropriation, his object in making the appropriation, the quantity of land capable of irrigation, the necessity for irrigation together with his actual appropriation and use, must be considered. These and other rules are well stated by Mr. Justice Hawley in *Hewitt v. Story*, 64 Fed. 510, [30 L. R. A 265, 12 C. C. A. 250]. (See the many cases there cited.) Said the learned judge: "The diversion of the water ripens into a valid appropriation only where it is utilized by the appropriation for a beneficial use; and the surplus or waste water of a stream may be appropriated, subject to the rights of prior appropriators, and such an appropriator is entitled to use all such waters; that in controversies between prior and subsequent appropriators of water, the question generally is whether the use and enjoyment of the water for the purpose to which the water is applied by the appropriator have been in any manner impaired by the acts of the subsequent appropriator." Applying these principles to the case in hand, it is quite apparent that the defendant never did, either by the acts of his predecessors in interest or by his own acts, acquire a right to a greater quantity of the waters of Sam's Creek than has been allowed him in the judgment, to wit: one-half thereof.

There was evidence that the Trimble ditch was built in 1883; its head is above the head of defendant's ditch a short distance and its use for conveying water to the Trimble place was well known to the users of water through the Kerlin ditch. The evidence was that the use made of the water was for domestic purposes and only a few acres were irrigated, and that about an equal acreage was irrigated on the two places and for like purposes and substantially the same quantity of water utilized. This mutual use of the water was open, notorious and under claim of right respectively by the parties using the water and continued uninterrupted for

nearly twenty years and this use was never materially interfered with or seriously disputed until in 1908 when defendant destroyed plaintiff's dam. In speaking of the evidence the learned trial judge said:

"The evidence is somewhat conflicting as to the amount of water at first taken from the stream through either the Kerlin or Trimble ditches, and the appliances at the head of both ditches prior to 1904 having been of a crude and temporary nature, the extent of the appropriation to any reasonable degree of certainty, must be determined through a consideration of the purposes for which the water was needed, the amount of lands cultivated, and the character and amount of crops raised.

"The purpose for which the water is and was needed on both places, their similar cropping and cultivation, their nearness in vicinage, their like want of proper storage facilities, the nearness of the points of appropriation on the stream, the absence of any tributaries or feeders of Sam's Creek reaching that stream between the heads of the respective ditches, the fact that the stream furnished sufficient water with reasonable use to irrigate both places, and the use without conflict for a long series of years prior to 1908, forces the conclusion that each of the users of the water appropriated the same substantially, to an equal extent and that the rights to the use of the waters should be fixed and determined on that basis."

Attention is called to the fact that it does not appear that the deeds under which plaintiff acquired title to her land made any reference to the Trimble ditch or the water of Sam's Creek. The muniments of title were not introduced by either party, it having been stipulated that they were the owners, respectively, of the lands claimed by them.

No objection was made to the evidence of the use of the Trimble ditch and the waters of Sam's Creek as belonging to the owner of the Trimble place. That this ditch and water were used and enjoyed by the owner of the Trimble place and claimed as belonging to it very clearly appears. The grant of the land carried with it, by implication, this ditch and the water conveyed through it as incident to the land. It is altogether probable that the deeds conveyed the "appurtenances" in terms, but whether they did is not material. It was held in *Cave v. Crafts*, 53 Cal. 135: "The word 'ap-

purtenance' is not necessary to the conveyance of the easement. The general rule of law is, that when a party grants a thing, he by implication grants whatever is incident to it and necessary to its beneficial enjoyment. The incident goes with the principal thing." (*Rubio Cañon etc. Assoc. v. Everett*, 154 Cal. 29, 32, [96 Pac. 811]; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 724, [15 L. R. A. (N. S.) 359, 93 Pac. 858].)

We do not think defendant's rights were enlarged or strengthened by the terms used in the deed to him in 1905, which purported to convey the Kerlin ditch and one hundred and forty-four miner's inches of the waters of Sam's Creek. The rights of plaintiff had attached long prior to that date, and in fact there was evidence that her rights were not questioned at that time. Defendant's grantor could not convey something he did not own.

Neither did the fact that defendant's predecessor, Kerlin, posted a notice of his claim to one hundred and forty-four miner's inches of water at the head of his ditch affect plaintiff's rights. "His right is not measured by the extent of his appropriations as stated in the notice, or by the actual diversion from the stream, but by the extent to which he applies the waters for useful or beneficial purposes." (*Hufford v. Dye*, 162 Cal. 147, 153, [121 Pac. 400].)

Finding XXI is attacked as a solution of the controversy entirely without support in the evidence. The contention is that the finding is inconsistent with the theory of the original complaint, and is based upon the amendment thereto. This amendment was filed before the trial and became as much a part of the complaint as if originally incorporated in it. We do not see, however, that, because the parties both claimed a definite quantity of the water, the court was precluded from making an equitable division of it without indicating a given number of miner's inches to each. In view of the fact that the flow of the stream varied greatly at different seasons of the year, and as there was evidence that for a long period of time the claimants to the water had used substantially the same quantity and found it sufficient for their purposes, it seems to us that the simplest as well as the most equitable method of division and the one least likely to give rise to future trouble, was that adopted by the court. By it plaintiff

can take no more than one-half of the water at any stage. The other half at all times must be allowed to pass to defendant's ditch. It is true that, in most cases, it becomes the duty of the court to fix definitely the quantity of water to be taken or the quantity of land to be irrigated (*Watson v. Lawson*, 166 Cal. 235, [135 Pac. 961], cited by appellant); but where, as here, it is only at the season of the year when the water is low that the parties use all of it for beneficial purposes, the quantity is immaterial inasmuch as there are no other claimants and as each is allowed what he is entitled to,—namely, one-half. We cannot see that defendant is prejudiced or injured in any way by this adjustment of the respective rights involved. Defendant rests his contention, as he does elsewhere, upon the claim that plaintiff's rights are subordinate to his and hence should have been definitely fixed. But we have seen that such contention is not borne out by the evidence. There is evidence that justifies the division of the water as made by the trial court and that as to the use of the water the parties stand upon an equal footing. The form of the judgment is, therefore, without objection. (*Harris v. Harrison*, 93 Cal. 676, 680, [29 Pac. 325].)

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 2, 1914.

[Crim. No. 475. First Appellate District.—December 5, 1913.]

THE PEOPLE, Respondent, v. GEORGE POWERS, Appellant.

CRIMINAL LAW—ROBBERY—HEARSAY EVIDENCE AS TO REPUTATION OF ACCUSED—LETTER FROM CHIEF OF POLICE.—In a prosecution for robbery, it is error to admit in evidence a letter received from a city chief of police by the constable of the township wherein the crime was committed, which tends to show that the accused is a man of bad character, that he has several aliases, that he has been

convicted of grand larceny, that he has been previously arrested upon a charge of highway robbery, and that he is well known to the police of such city, who have his criminal record, photograph, and Bertillon description.

ID.—OBJECTION TO EVIDENCE—WAIVER BY STIPULATION THAT IT BE READ TO JURY.—Where such hearsay evidence is admitted over objection and is about to be handed to the jury, objection to its admission is not waived by counsel for defendant insisting that it be read to the jury and stipulating to that effect, after again objecting to it as evidence.

ID.—HEARSAY EVIDENCE—ERROR IN ADMITTING—WHEN NOT CAUSE FOR REVERSAL.—Error in the admission of such evidence is not cause for a reversal of a judgment of conviction, where the evidence of guilt is positive, direct, and certain, and not contradicted by the defendant himself, who voluntarily took the stand, but testified only to a fact not in dispute.

APPEAL from a judgment of the Superior Court of Contra Costa County and from an order refusing a new trial. J. E. Barber, Judge presiding.

The facts are stated in the opinion of the court.

Everett B. Taylor, and R. L. Boyer, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of the defendant upon a charge of robbery and from an order denying his motion for a new trial.

The principal points urged by the appellant upon this appeal turn upon the admission in evidence of certain documentary matter which seriously reflected upon the character and standing of the defendant before the jury, and with respect to which it is claimed that the district attorney was guilty of gross, persistent, and prejudicial misconduct both in his insistence upon the admission of this objectionable matter, and in his subsequent comment upon its effect before the jury.

The record shows that shortly after the robbery was committed and reported to him, one J. J. Fox, a constable of the township wherein the scene of the crime was laid, sent out certain notices and circulars containing a statement of the

commission of the robbery and a description of the suspected offender; and that in response thereto he received from the chief of police of Los Angeles a mailed envelope purporting on its outside to have come from the office of that official, and inclosing a picture and Bertillon description of the defendant, and also a letter from said chief of police which was as follows:

“Constable J. J. Fox, Crockett, Cal.

“Dear Sir: I am in receipt of your letter of the 30th ult., enclosing your circular describing George Powers, whom you want for felony; and I am sending you herewith copy of our picture and Bertillon description of him. He is known to us as George B. Powers, alias George James Howard, alias George Welch, alias John White, alias John Kelly, and is liable to use any name. He was arrested in this city on June 23rd, 1905, on charge of highway robbery; On August 10th was tried, but the jury disagreed, and the district attorney dismissed the case. In November, 1909, he was received at San Quentin from Alameda County for three years for grand larceny. His San Quentin number is 23,937; discharged March 18, 1912. This man is well known to the officers of my department, and I think we will undoubtedly get him for you if he returns to this city.

“Very truly yours,

“C. E. SEBASTIAN,

“Chief of Police.”

The Bertillon description accompanying this letter was as follows:

“Institution: City Prison, Los Angeles, Cal.

“Bureau of Identification, Department of Police, Detective service.

“Name: George G. Powers; Registered number, 3412; Color, White; Alias George James Howard, George Welch, John White, John Kelly; arrested June 23, 1905; residence _____; Occupation, bricklayer; Descent, American; Crime, robbery. Held _____ P. C. number _____; Officer, Smith, Benedict and Murphy. Bail _____. Sentenced _____. August 10, 1909, jury disagrees. Previous numbers as George Welch, rec'd. Nov. '09, from Alameda Co. three years, S. Q., 23,937 for G. L. Dis. March 18, 1912.

"Marks, scars and moles: 1st. Dagger piercing the flesh left lower arm ext., Pansy and leaf on left lower arm. 2nd. Clasped hands, double heart, red flower and wreath right arm. 3rd. Small scar 1 m. 1 up. rib."

Counsel for the people insisted, over repeated objections on the part of the defendant, in introducing in evidence this envelope and its inclosures. The reporter's transcript of the trial shows that no tangible explanation or sufficient reason was given at the time why evidence of this highly objectionable and purely hearsay character should be submitted to the jury. Its import was to show that the defendant was a man of bad character; that he had several aliases; that he had been convicted of grand larceny and had served a term in the state prison; that he had previously been arrested in Los Angeles upon a charge of highway robbery, upon his trial for which the jury had disagreed, and that he was well known to the police of that city, who had his criminal record, photograph, and Bertillon description. Had the chief of police of Los Angeles been called as a witness to testify to any of these things it is perfectly apparent that he could not have been legally heard to do so over the defendant's objections; and this being so, why his letter or an unattested record of his office should be deemed admissible passes comprehension.

The attorney-general in his brief upon this appeal does not even attempt to offer any justification of the action of the district attorney in offering and procuring the admission in evidence of the envelope or its inclosures in the first place; but contends that after the admission of this objectionable matter in evidence the defendant expressly waived his objection to it. The state of the record on this point shows that after defendant's counsel had repeatedly but vainly objected to the offer in evidence of the envelope and its inclosures, and when, after being admitted over such objection, they were about to be handed to the jurors for their inspection, the following colloquy occurred:

"Mr. Taylor (defendant's counsel): We will insist that as long as the matter is introduced in evidence that it be read to the jury, and we will stipulate that it may be read in evidence.

"Mr. Ormsby (district attorney): I will accept the stipulation of counsel, and read them. The communication or letter reads as follows:

"Mr. Taylor: We are going to object to it if it is allowed to go in evidence on the ground that it forces the defendant to be a witness against himself.

"The Court: The objection is overruled."

The letter and description were then read, whereupon defendant's counsel again renewed his objections to both, stating and arguing the same at length, and assigning the remarks of the district attorney and the introduction of the matter in evidence as prejudicial error.

It would seem quite plain from this state of the record that the only extent to which counsel for the defendant intended his stipulation to go was that of agreeing that the obnoxious matter should be read to the jury instead of being handed to them to inspect and read, and that he must have been so understood by counsel for the prosecution and the court at the time in view of his later objections and the rulings thereon.

The record further shows that at the close of the people's case, the defendant took the witness stand, and was asked by his counsel on direct examination these two questions: "Q. Were you ever convicted of a felony? A. Yes, sir. Q. When did you get out of San Quentin? A. March 18, 1912." The record further discloses that in the information in the case the defendant, in addition to being charged with robbery, was also charged with this prior conviction of felony, and that he had upon his plea admitted the charge of prior conviction.

This being the state of the record upon the entire matter it would seem that whatever error the court may have committed in the admission of incompetent evidence as to the prior conviction of the defendant was cured by his own affirmative testimony; and even if not so cured would not, in view of the defendant's plea, constitute such prejudicial error as to warrant a reversal of the case. But his reasoning cannot be held to apply to the other portion of the letter and inclosure from the chief of police of Los Angeles detailing the defendant's arrest and trial upon another charge of robbery, in which the jury disagreed. The error of the admission of this sort of incompetent evidence against a defendant in this or any case must be held to be a highly prejudicial violation of an essential and long-established rule of criminal evidence intended to safeguard the character and rights of a defendant

on trial for a particular crime. It is to be noted, however, that the incompetent evidence thus admitted had no direct bearing or effect upon the affirmative evidence of the prosecution with respect to the details of the crime. But it is such an error as would, in every case of its occurrence, constrain the appellate court to set aside the judgment and grant a new trial were it not for the counter-compulsion of section 41½ of article VI of the constitution, which requires that "No judgment shall be set aside, or new trial granted in any criminal case on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, after an examination of the entire cause including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The examination of the entire cause including the evidence, which the constitution thus compels in this case, shows that the defendant George Powers, alias George Welch, was proceeded against upon an information wherein he was charged with the crime of robbery, alleged to have consisted in the violent, forcible, and felonious taking from one Robert McCasslin of the sum of sixty-five dollars. The information also charged a conviction of a previous felony of like character. The defendant pleaded not guilty to the direct offense charged; but admitted his conviction of the former crime. Upon the trial the said Robert McCasslin testified that he was a messman on an oil steamer lying at the oil dock near Port Costa on the second day of April, 1912; that he left the ship about twenty minutes past ten o'clock on the night of that day and walked along the track to Crockett; that he went to the Arcade saloon, arriving about half past eleven, where he had one drink, and after remaining there a few moments went to the "Idle Hour" saloon near by, where he had four more drinks and where he remained until the closing time at twelve o'clock, when he went outside and stood in front of the saloon talking to two acquaintances named Phillips and Ford. While standing there the defendant, whom he had known several years before under the name of Howard, but who while in the saloon had been presented to him under the name of Kelly, came up and asked for some money to get something to eat and a place to sleep, and that McCasslin took out the

sack which held his money and gave him two dollars. McCasslin then announced his intention to go back to his ship, when Kelly "offered to walk a ways with him" on account of it being a lonely place. Accepting his offer they proceeded down the track for some distance, when "Kelly suddenly threw his arm around his neck and struck him in the face; and when he cried out threatened to kill him, and thrust a gag in his mouth and threw him violently down on the track, and struck his face against the rail, and then thrust his hand into his pocket and took his money; that McCasslin became unconscious and remained so for some time, during which his assailant disappeared; upon recovering consciousness McCasslin went to the Port Costa depot, and told that he had been held up and robbed by a man named Kelly, whom he then described and from which description the defendant was later arrested. The witness positively identified the defendant as the man whom he had formerly known under the name of Howard, and who had been presented to him on the night of the robbery under the name of Kelly; and also positively identified him as his assailant. The other persons who were with McCasslin in front of the "Idle Hour" saloon also testified to the defendant's presence there and that he was the last person seen in company with McCasslin only a short while before the robbery. The defendant was also shown to have disappeared from Crockett immediately after the date of the crime. The testimony of the witnesses for the people was not only unshaken upon cross-examination, but was uncontradicted by any evidence educed on the part of the defendant. The only witness in fact for the defendant was himself; and the only questions asked of him by his counsel were the two above set forth. The district attorney undertook to question him as to his whereabouts on the night of the crime, but was not permitted to pursue the inquiry. The defendant was not asked to either affirm or deny the commission of the crime although he was a voluntary witness in his own behalf.

The jury brought in a verdict of conviction of the defendant of robbery; and the judgment and order denying a new trial followed in due course.

From the foregoing examination of the entire cause including the evidence this court is entirely satisfied that there has been no miscarriage of justice in this case. It is true that

the error complained of was gross; and in a case wherein the evidence of guilt was less positive, direct, and certain, or was contradicted by that of the defendant himself, would doubtless work a reversal of the judgment. The provision of the constitution, while it constrains this court to affirm the judgment and order denying a new trial in this case, is not to be taken as justifying or in any wise encouraging the commission by trial courts and prosecuting officers of errors of this character in their effort, however laudable, to convict persons whom they believe to be justly accused of crime.

The judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on December 31, 1914, and the following opinion then rendered thereon:

THE COURT.—A careful examination of the record in the light of the petition for rehearing herein assures us that the statement in our opinion of the uncontradicted facts showing the guilt of the defendant, is a fair and sufficiently full resumé of the evidence; and also that in the application of the provisions of section 4½ of article VI of the constitution thereto the opinion of the court is in entire accord with its views expressed in the case of *People v. Lawlor*, 21 Cal. App. 63, [131 Pac. 63], and is not out of alignment with the views expressed by Mr. Justice Sloss in the case of *People v. O'Bryan*, 165 Cal. 55, [130 Pac. 1042].

In the decision of the case at bar we are not to be understood as holding that in order to have procured a reversal of the case for the error complained of, the defendant would have been compelled to take the witness stand at the trial. The law permits no such compulsion; and this case is not to be taken as pointing to the conclusion that in cases where the erroneously admitted evidence bears directly upon the commission of the specific crime, the defendant must be a witness in his own behalf in order to procure a reversal of the case. Each cause involving the application of section 4½ of article VI of the constitution must be adjudged by its own facts. In the case at bar the incompetent matter admitted in evidence

had no relation to the immediate proofs of the defendant's crime. Had he taken the witness stand to deny the commission of the crime they would have weighed against him as a witness; and for that reason, as well as for the reason that his denial of the commission of the crime would have so changed the face of the record as to leave the proofs against him no longer undisputed, he would have been entitled to a retrial of his case. The defendant was under no compulsion to become a witness in this case. He did so voluntarily, but only to testify to a fact not in dispute and no longer material to the issue. Being a voluntary witness in his own behalf he saw fit to say nothing in contradiction of the otherwise undisputed evidence tendered on behalf of the people; and he cannot now be heard to complain that the uncontradicted and conclusive proofs of the prosecution compel the application of the constitutional provision to his case.

The petition for a rehearing is denied.

[Civ. No. 1134. Second Appellate District.—December 5, 1913.]

MAMIE V. RAWLES et al., Respondents, v. LOS ANGELES GAS & ELECTRIC CORPORATION, Appellant.

WITNESS — CROSS-EXAMINATION AS TO DEPRESSION IN STREET — WHETHER QUESTION CALLS FOR CONCLUSION.—Where, in an action by a pedestrian for personal injuries sustained from stepping into a depression left in a street by a gas company, a photograph of the depression, taken the day following the accident, is admitted in evidence, and the witness who took it testifies that he made no examination of the depression on the day of the accident, but that the street was in the same condition when he took the photograph as when the accident occurred, it is proper cross-examination to ask him how he knows the conditions were identical.

ID.—CROSS-EXAMINATION—OPINION OR CONCLUSION OF WITNESS—REFUSAL TO STRIKE OUT.—Where a witness in such case, who visited the scene of the accident, has testified on direct examination as to the dimensions of the depression, is asked on cross-examination, "How did you happen to go down and visit that hole?" and in reply says, among other things, that on seeing the depression he stated this "is gross carelessness on the part of this party that

dug this hole," it is error to refuse to strike out such opinion or conclusion.

ID.—ORDINANCE REGARDING STREET EXCAVATIONS—INTRODUCTION IN EVIDENCE—INSTRUCTIONS.—If in such action a city ordinance is introduced in evidence, detailing the requirements as to making and refilling excavations in streets, and containing provisions beneficial to the city as administrative regulations and other provisions for the benefit of persons using the street, and the court gives a general instruction that a violation of the latter provisions, if the proximate cause of the plaintiff's injuries, is sufficient to show a breach of duty and consequent negligence, it might well go further and define the provisions designed for the benefit of private persons.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. George H. Hutton, Judge.

The facts are stated in the opinion of the court.

Wm. A. Cheney, Leroy M. Edwards, and Paul Overton, for Appellant.

Kendrick & Ardis, for Respondents.

JAMES, J.—Plaintiff Mamie V. Rawles, in October, 1910, while alighting from a car on First Street, at Broadway, in the city of Los Angeles, placed her foot into a depression then existing in the surface of the street. As she did so her foot turned to one side causing a sprain to the ankle. She then brought this action against the defendant, the complaint charging that it was through defendant's negligence that she was injured, because the latter had not repaired the street surface at the point mentioned after making an excavation therein. The jury by its judgment awarded her damages in the sum of one thousand five hundred dollars, from which judgment, and from an order denying its motion for a new trial, defendant has appealed.

It was shown in evidence that the defendant, a few days prior to the day upon which the alleged injuries were sustained by said plaintiff, caused a small excavation to be made in the street near the car-track, of about two feet by three feet in dimensions, for the purpose of reaching a gas-pipe.

The earth was replaced in the hole thus made, also the rock surfacing, and on top of this was laid a square of asphaltum pavement which had been cut from the surface. At the time the refilling was made of the excavation the surface was left in an almost level state. Under the requirements of an ordinance of the city of Los Angeles, then in force, where excavations were made in the street, the person or corporation so making them was obliged to restore the surface to its original condition, or as nearly to that state as was practicable, but the surface paving was not permitted to be done until the earth and material in the refilled excavation had had time to settle. The ordinance of the city covering these matters was introduced in evidence. At the time the said plaintiff sustained the injuries complained of, the repaving had not been done, and vehicles and pedestrians had crossed over the spot. As to the depth of the depression there was some difference in the testimony, some of the witnesses stating that the hole was from two to six inches in depth. A photograph was introduced in evidence, which it was testified had been taken on the morning following the accident. A copy of this photograph is attached to the record in the case. It appears from an inspection of it that at the time it was taken a street-car had stopped almost opposite the place, and the figure of a woman appears almost over the point of depression in the street, although this figure is very much blurred, owing no doubt to the fact that the person was in motion at the time the camera was being operated. Just why a photograph intended to illustrate the condition of the depression in the street should have been taken with other objects present, around and upon it, can only be conjectured. The fact that it does not present a thoroughly clear representation of the spot makes it important that the ruling of the court in restricting the cross-examination of plaintiff P. L. Rawles, the husband of the injured person, should be closely examined. The photograph was taken, as the evidence showed, on the morning following the evening of the alleged accident. Plaintiff P. L. Rawles was the only witness who gave testimony tending to establish that the depression, at the time the photograph was taken, was in the same condition as when his wife stepped into it and received her injuries. After testifying that the conditions were the same, he stated on cross-

examination that on the night of the accident he had not measured the hole, nor had he made an examination of it. He then said: "It was so dark there that I could not see this hole at all for a few minutes." The following dialogue then occurred: "Q. When you did see, did you examine the hole carefully? A. No, sir. Of course—Q. You did not? How, then, can you testify that the hole was in exactly the same condition the next day and when you took this picture afterwards, if you didn't examine the hole that night?" This last question was objected to as calling for a conclusion of the witness, and the objection was sustained. In this ruling the court erred. The jury had submitted to them a photograph which was not taken at the time that the first-named plaintiff received her injuries, and it was incumbent upon the plaintiff to show that the photograph correctly represented the condition as it had existed on the day before the photograph was taken. The defendant was entitled to examine closely the witness by whom the identity of condition was sought to be established, and the question asked to which objection was sustained did not call for a conclusion of the witness, but called for a statement of fact as to how he could tell, if he did not make an examination of the depression at the time of the alleged accident, that its condition was the same as was represented by the photograph. This is not the only error which occurred during the course of the trial, which appears to have been made with prejudice to the substantial rights of defendant. Another witness, Keym, testified that he visited the point in question on the day following the accident, and he testified as to the dimensions of the excavation. He testified that he had taken measurements of those dimensions, but at the time of the trial had lost his record of them. On cross-examination, in order, no doubt, to have illustrated to the jury the matter of interest or bias of this witness, he was asked this question: "How did you happen to go down and measure that hole on the 11th of October at 9 o'clock in the morning?" to which the witness answered: "Mr. Rawles had told me that his wife had stepped in the excavation there and I said, 'being as I am going down town I will go down with you and take a look at it,' and after looking at it I says, 'that this is gross carelessness on the part of this party that dug this hole.'" Counsel for defendant immediately moved that the

answer be stricken out, which motion was denied. Defendant's counsel then said: "I object, your honor, to any statement of this witness as to what he states was his opinion whether there was negligence or not. The Court: You asked him how he came to measure the hole. Mr. Edwards: Not as to his statements to Mr. Rawles about the hole when he saw it. The Court: I think that is a proper part of the answer." The statement of the witness wherein he related that he had said to Rawles, "that is gross carelessness on the part of this party that dug this hole," was utterly incompetent and its effect upon the jury may well have been prejudicial. The question as to whether there was negligence was one for the jury to determine, and the opinion of any witness could not properly be given in evidence to suggest what conclusions should be made upon that issue.

The ordinance of the city of Los Angeles which was introduced in evidence, and in which was set out in detail the various requirements as to making and refilling of excavations, contained provisions in part of a nature beneficial to the city as administrative regulations, and provisions in part for the benefit of persons using the street. The court gave a general instruction that the violation of the protective clauses of a municipal regulation established for the benefit of private persons was sufficient to prove a breach of duty and consequent negligence, provided that the violation of such ordinance was the proximate cause of the injury. This instruction contained a correct statement of the law in the abstract, but the court might well have defined for the benefit of the jury just what provisions were designed for the protection of private persons. The only real objection to the introduction of the ordinance, however, was that under the circumstances of the case, defendant in making the excavation in question was not required to first procure a permit so to do; impliedly it was admitted that all other provisions were applicable, and if defendant had desired more specific instructions upon the matter adverted to, request should have been made that such be given. The court did expressly instruct the jury that the defendant was not required to secure a permit for doing the work which it performed in the street, and therefore those provisions of the ordinance requiring that such permit be obtained must be deemed to have been left out

of consideration by the jury. The question as to whether plaintiff was guilty of contributory negligence was one properly submitted to the jury.

Because of the errors referred to, the judgment and order appealed from are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 3, 1914.

[Civ. No. 1303. First Appellate District.—December 10, 1913.]

TUCKER, LYNCH & COLDWELL, Inc., Respondent, v.
M. J. HAWLEY, Appellant.

BROKERS—LEASE OF REAL ESTATE—RIGHT TO COMMISSION.—Under a contract providing that if a certain company "or any concern represented by" a designated person leases a building to be erected by the lessor, the lessor will pay a firm of real estate brokers a commission for services rendered in making the lease, the commission is earned upon the execution of a lease to lessees produced and presented by such person, irrespective of whether he has power to bind them.

ID.—BRINGING MINDS OF PARTIES TOGETHER—WHETHER NECESSARY.—Under such agreement it is unnecessary for the broker to bring the minds of the lessor and lessee together, and thus become the procuring cause of the execution of the lease. The agreement contemplates that the parties to the lease shall arrive at its terms themselves.

ID.—FORMATION OF CORPORATION BY LESSOR—EFFECT ON BROKER'S RIGHT TO COMMISSION.—The right of the broker to commissions under such contract is not affected by the fact that the building was erected by a corporation instead of by the lessor personally, as provided in the contract, the corporation having been formed for that purpose by the lessor, because of his lack of funds, and he being the owner of a large proportion of the stock.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Geo. C. Sargent, for Appellant.

N. C. Coldwell, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment for plaintiff and from an order denying defendant's motion for a new trial, in an action for services rendered as a real estate broker by the plaintiff to the defendant.

Defendant was the owner of a certain piece of real estate in San Francisco, which he desired to lease for warehouse purposes. On several occasions he had conversed with A. C. Hastings, an employee of the plaintiff, in regard to a tenant. In January, 1910, he again saw Hastings, showed him a working plan of a building he intended to erect, and told him that if he would bring him a tenant who desired a warehouse, he would pay the usual real estate commission. In response to an oral arrangement thereupon entered into, Hastings at once made efforts to find a tenant, and later Hastings in company with Colbert Coldwell, another employee of the plaintiff, saw the defendant in his office, and Coldwell told defendant that he thought that a tenant had been secured for the property, and asked to see the plans of the proposed warehouse so as to be able to discuss the matter with the prospective tenant. After spending some time in examining the plans it was seen that they were complicated, and the defendant suggested that the best thing to do was for Coldwell to bring the proposed tenant and the defendant together and let them discuss the matter. In this connection defendant further said, "Do this, and it will save going over the plans a number of times with you, and then by you with him, and I will protect you in your commisions." Coldwell assented, and brought the defendant and B. F. Mackall together, the latter representing the Western Basket and Barrel Co. Thereupon, after some discussion as to the amount of plaintiff's commission, the defendant signed the following document:

"San Francisco, Cal., Jan. 8th, 1910.

"For value received the undersigned agrees that if the Western Basket & Barrel Company, or any concern represented by B. F. Mackall, leases the building to be erected by

the undersigned in the block bounded by First and Second streets and Bryant and Brannan streets, San Francisco, Cal., that he will pay to Tucker, Lynch & Coldwell Inc. the sum of fifteen hundred (\$1,500) dollars for services rendered in making the said lease. Above covers the entire building, a smaller section will be pro-rated.

“M. J. HAWLEY.”

At the time of signing this document it was agreed that plaintiff would do all it could to get the Western Basket & Barrel Company to take a lease of the property, and defendant remarked that he wanted plaintiff to understand he expected he would have trouble in financing the building, but with the aid of a tenant he thought he could do so.

After many conferences, at which changes in the proposed building, the term of the lease, and the rent to be paid for the property, were discussed, the parties finally agreed upon the provisions of a lease; but the defendant being unable to finance the erection of the building, he organized a corporation for that purpose, and became the owner of one-half of the stock thereof. That corporation, named the Rincon Warehouse Company, as lessor, executed a lease to the Western Basket & Barrel Company, the Earl Fruit Company, and Comyn-Mackall Company (a partnership), as lessees.

In regard to the stipulation in the agreement that the commission would be payable to plaintiff if the lease should be made to the Western Basket & Barrel Company or any concern represented by Mackall, it is conceded that Mackall represented said company, but defendant denies that he represented the Earl Fruit Company.

“The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning. . . .” (Civ. Code, sec. 1644); and the circumstances under which this agreement was made show that the word “represented” was used therein in its ordinary and popular sense. As employed in the contract it would include any concern for whom Mr. Mackall acted in the negotiations for the settlement of the terms of the proposed lease. It is quite plain, we think, that it was not the intention of the contract, as urged by the defendant, that Mackall should have power to bind a tenant proposed by him. It was sufficient if he produced and presented a person as a lessee to

sign the lease. The Earl Fruit Company was produced as a lessee of the property by Mackall at the suggestion of the defendant, who desired that company to execute the lease as a lessee, as security for the payment of the rent.

We agree with the position of the plaintiff that it was unnecessary for it as agent to bring the minds of the defendant and of the proposed tenants, or of the latter and the warehouse company, together, and thus become the procuring cause of the execution of the lease. Under the terms of most agency contracts for the sale or leasing of real property, perhaps that much would be required; but we do not think it is so in the present case, for under the provisions of the agreement the plaintiff was entitled to its commission whenever the Western Basket & Barrel Company, or any concern represented by Mackall, entered into a lease with the defendant for the property described. The plaintiff was not to bring the parties to an agreement as to the terms of the lease. The circumstances of the case show clearly that the agreement contemplated that the parties to the lease should arrive at its terms themselves. It is true that the plaintiff agreed when entering into the contract to perform services as a real estate agent to induce its client or clients to make the lease, and such services the trial court, upon ample evidence, found that the plaintiff fully performed.

The plaintiff rendered valuable services to the defendant before the agreement of January 8th was executed; and for the purpose of facilitating the transaction and at the suggestion of the defendant, the plaintiff brought the parties to the lease together, with the distinct understanding that if they agreed upon and executed a lease of the described property the plaintiff was to be entitled to one thousand five hundred dollars. After the execution of the agreement plaintiff did what it could to bring the parties to the lease to an understanding; and, as far as the point under discussion is concerned, we have no doubt the plaintiff was entitled to the payment agreed upon.

There is no merit in the contention that because the defendant did not personally construct the building, but that it was erected by the Rincon Warehouse Company, the condition of the contract was not fulfilled. That condition was that if the Western Basket & Barrel Company or any concern repre-

sented by B. F. Mackall, leased the building to be erected by the defendant on the property described, the commission would be paid. The defendant not being able to finance the erection of the building, formed a corporation to accomplish that purpose. The building was completed substantially as contemplated, and leased to the parties represented by Mackall. The description of the building as "to be erected by the undersigned" (M. J. Hawley) was sufficiently answered by a building erected by a corporation which he was instrumental in forming for that purpose and in which he owned a large proportion of the stock. The whole matter is one transaction which resulted in the defendant accomplishing the object sought when he employed the plaintiff. (*Steidl v. McClymonds*, 90 Minn. 205, [95 N. W. 906]; *Burke v. Cogswell*, 39 Minn. 344, [40 N. W. 251]; *Smith v. Mayfield*, 60 Ill. App. 266, 269.) It is true that the building erected was not constructed strictly according to the original plans submitted by the defendant to the plaintiff. Such plans were tentative only; and this point, like every other point made in the case by the defendant, is technical, and does not affect the merits of the case. It was not essential, to entitle the plaintiff to recover its compensation, that the defendant and the lessees should have entered into a lease upon the precise terms first named by the defendant. It was through the instrumentality of the plaintiff that the defendant and the lessees met and opened negotiations which, without interruption, ultimately culminated in the execution of the lease substantially as contemplated; and hence the plaintiff must be regarded as having earned its commission under the agreement of January 8th and entitled to the same. (Gross on Real Estate Brokers, p. 145, sec. 135; 19 Cyc. 249, et seq.)

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 9, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 7, 1914.

[Civ. No. 1398. First Appellate District.—December 10, 1913.]

FRIEDA R. MAJOR et al., Appellants, v. DAVID F. WALKER, et al., Defendants and Respondents; WALTER H. LINFORTH, Administrator etc., Defendant and Respondent.

CORPORATION—MISAPPROPRIATION BY DIRECTOR—NATURE OF LIABILITY THEREFOR—SURVIVORSHIP OF ACTION.—The liability of a director of a corporation to its stockholders and creditors for the embezzlement and misappropriation of its funds is contractual, not penal in its nature, and a cause of action to enforce it survives his death and may be prosecuted against his administrator.

Id.—DEATH OF DEFENDANT—SUBSTITUTION OF ADMINISTRATOR.—When an action has been brought against a director of a corporation for an embezzlement and misappropriation of its funds, it is error, after his death, to dismiss the action and to vacate a previous order substituting the administrator of his estate as party defendant.

APPEAL from orders of the Superior Court of the City and County of San Francisco dismissing action and vacating substitution of administrator as party defendant. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Daniel O'Connell, for Appellants.

Ross & Ross, for Respondents.

RICHARDS, J.—This is an appeal from an order of the superior court in and for the city and county of San Francisco, setting aside its order theretofore made, substituting Walter H. Linforth, administrator of the estate of David F. Walker, deceased, in the place and stead of said David F. Walker, who, prior to his death, had been one of the defendants in the case, and from a further order dismissing the action as to said defendant Walker.

The facts of the case leading up to the entry of the orders appealed from are the following: The plaintiffs Frieda R. Major and Kate O'Connell, the administratrix of the estate of George P. Connell, deceased, each brought a separate ac-

tion against David F. Walker, and a number of other persons, directors of the California Safe Deposit & Trust Company, to enforce the alleged liability of the defendants as such directors, for the alleged mismanagement of the institution. These two actions were consolidated in the court in which they were pending; and thereafter and during the lifetime of David F. Walker the plaintiffs filed therein their fifth amended complaint, wherein, purporting to act not only for themselves, but also on behalf of all of the depositors and creditors of said corporation, numbering several thousand persons, they seek to enforce the aforesaid liability of the defendants for the mismanagement of the corporate affairs.

Subsequent to the filing of this fifth amended complaint David F. Walker died, and Walter H. Linforth was duly appointed administrator with the will annexed of his estate. Thereafter and on February 9, 1912, upon the suggestion of the attorney for plaintiffs, the court made its *ex parte* order substituting said Walter H. Linforth, administrator, etc., as a party defendant in the place and stead of said Walker. Upon April 20, 1912, upon motion of said Linforth, the court made an order setting aside its previous order of substitution, and further ordered that the action be dismissed as to said David F. Walker, deceased.

It is from these orders that this appeal has been taken.

The only substantial question presented upon this appeal is as to whether an action begun for the enforcement of the liability of a director of a corporation under section 3 of article XII of the state constitution, survives the death of said director.

The section under review reads as follows: "Each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock, or shares of the corporation or association. The directors or trustees of corporations and joint stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint stock association during the term

of office of such director or trustee." (Const., art. XII, sec. 3.)

The respondent upon this appeal contended in the lower court and here contends that the liability of the directors of a corporation for the embezzlement or misappropriation of its funds is a liability not founded upon contract, but is a liability penal in its nature; and hence that the cause of action to enforce such liability died with the death of David F. Walker and did not survive against his administrator or estate.

The question as to whether the liability of directors of a corporation for the embezzlement or misappropriation of its funds is contractual and not penal in its nature, has been decided adversely to the respondents' contention by the supreme court of this state in the case of *Winchester v. Howard*, 136 Cal. 432, [89 Am. St. Rep. 153, 69 Pac. 77]. This case is in no wise to be distinguished from the present one in so far as the nature of a director's liability is concerned; and the language of this decision has been adopted by the United States circuit court of appeals in the several cases of *In re Brown*, 164 Fed. 673, [90 C. C. A. 489]; *In re Bartnett*, 164 Fed. 679, [90 C. C. A. 495], and *Walker v. Woodside*, 164 Fed. 680, [90 C. C. A. 644], in each of which cases it will be noted that the same corporation and the same parties were before the federal court which are before this court, and upon the same questions raised by this appeal.

In view of the foregoing rulings of the state and federal tribunals to the effect that the liability of a director of a corporation to its stockholders and creditors for the embezzlement and misappropriation of its funds is contractual and not penal in its nature, this court is constrained to hold that the contention of the respondent herein that the cause of action attempted to be set up in the plaintiff's fifth amended complaint did not survive the death of David F. Walker, cannot be upheld. It would follow that since such cause of action survived and could be prosecuted against the executor or administrator of the decedent's estate under section 1582 of the Code of Civil Procedure, the order of the superior court in which this action was pending, directing the substitution of Walter H. Linforth, as administrator with the will annexed of the estate of David F. Walker, deceased, in the place and

stead of said David F. Walker, upon the suggestion of the latter's death, was a proper order, and that the same should not have been set aside, nor should the action have been dismissed against David F. Walker.

In the adoption of these views the court has not deemed it proper to take into account any of the alleged infirmities of the plaintiff's complaint; and especially its asserted insufficiency in the failure to aver that a claim has been presented against the estate of David F. Walker, deceased, in respect to the liability sought to be enforced in this action. These are matters for the consideration of the trial court upon objections therein properly presented to the form and substance of the plaintiff's fifth amended complaint.

The orders appealed from are reversed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 6, 1914.

[Civ. No. 1109. Third Appellate District.—December 12, 1913.]

SAMUEL GRAY, Respondent, v. ERNEST F. O'BANION,
Appellant.

ELECTIONS—BALLOT—DISTINGUISHING MARK—CROSS OUTSIDE SQUARE.—

A cross on a ballot, made by the voter with the voting stamp, immediately to the right of the name of one of the candidates, and not in the voting square, constitutes a distinguishing mark under section 1205 of the Political Code.

ID.—DISTINGUISHING MARK ON BALLOT—WHAT CONSTITUTES.—A distinct mark in the form of < on a ballot between the words "amend" and "section" in a referendum proposition which, from its position on the ballot with reference to the other marks properly made with the voting stamp, cannot be regarded as a transfer from such marks caused by the folding of the ballot, is a distinguishing mark.

- ID.—BLURS AND OFFSETS DUE TO FOLDING BALLOT.**—Blurs caused by the awkward handling and folding of ballots, and offsets, that is, the transference of the mark of the voting stamp through the folding of ballots before the ink becomes dry, are not distinguishing marks.
- ID.—EDUCATIONAL QUALIFICATION OF VOTER—FINDING OF TRIAL COURT—CONCLUSIVENESS.**—A finding of the trial court in an election contest that a voter was under sixty years of age at the time of the adoption of the constitutional amendment prescribing an educational qualification of voters, is conclusive on appeal.
- ID.—RESIDENCE OF VOTER—DWELLING ON LINE DIVIDING TWO DISTRICTS.**—Where the dividing line between two supervisorial districts runs through a dwelling-house, so that the greater part of the dining room is in one district and the other rooms are mostly or altogether in the other district, the owner or occupant has the right to vote in the latter district.
- ID.—VOTING IN WRONG DISTRICT—WHETHER BARS VOTING IN RIGHT ONE.**—And his right to vote there is not affected by the fact that heretofore he has illegally voted in the other district.
- ID.—DOMICILE OF LABORERS ON RANCH—DWELLING IN ONE DISTRICT—BUNKHOUSE IN ANOTHER.**—Where the boundary line between two election districts divides a ranch so as to leave a bunkhouse and a larger part of the dining-room of the dwelling-house in one district, and the remaining and larger portion of the dwelling-house in the other district, unmarried laborers employed on the ranch, who sleep in the bunkhouse and take their meals in such dining-room, are entitled to vote in the first district.

APPEAL from a judgment of the Superior Court of Sutter County. Wm. M. Finch, Judge presiding.

The facts are stated in the opinion of the court.

W. H. Carlin, and A. H. Hewitt, for Appellant.

A. C. McLaughlin, and M. E. Sanborn, for Respondent.

HART, J.—The plaintiff and the defendant were opposing candidates for the office of supervisor for the fourth supervisorial district, in Sutter County, at the general election held throughout the state on the fifth day of November, 1912. There are or were, at the time of said election, six voting precincts in the said fourth supervisorial district, named as follows: Slough, Yocolumne, Rome, Knight, Barry, and Vernon. After said election, and at the time appointed by

law, the board of supervisors of said county met and officially canvassed the votes cast in said fourth supervisorial district for the office of supervisor as said votes were returned to said board of supervisors by the respective boards of election of the six precincts in said district. Thereupon the said board of supervisors found that the plaintiff had received two hundred and twenty-four votes and the defendant two hundred and twenty-six votes for the office of supervisor for said district, and officially declared that the defendant had been elected to said office, and accordingly, caused to be issued to him a certificate of election thereto.

Within due time, the plaintiff instituted this contest, whereby he challenged the validity of the declared election of the defendant to said office, upon the grounds: That there were counted and tallied for the defendant by the boards of election certain ballots which were illegally marked and which should, therefore, have been rejected; that certain ballots in favor of the plaintiff for the office of supervisor were rejected or not counted for him by the election boards, although said ballots, it is alleged, were in legal form and had been duly and properly cast for the plaintiff; that "at least five persons whose names appeared upon the register in use at said Rome precinct, and who voted at said election for defendant for said office of supervisor . . . were not lawfully entitled to vote in said Rome precinct at said election for the reason that said five persons were each and all of them nonresidents of said precinct at the time of said election, and no one of them had been an actual resident of said Rome precinct at any time during the period of more than thirty days next preceding the date of said election."

The court found that, at said election, the plaintiff received a total of two hundred and nineteen legal votes and that the defendant received a total of two hundred and seventeen legal votes for said office of supervisor; that the plaintiff was duly elected to said office, and that the latter was, therefore, entitled to a certificate of election, to be issued by the county clerk of said county of Sutter and authenticated by the seal of the superior court in and for said county; "that the certificate of election to said office, heretofore issued to the defendant herein, should be annulled."

Judgment was entered accordingly, and this appeal is by the defendant from said judgment.

At the trial all the ballots which were cast in the supervisor district for the candidates for supervisor—the parties to this contest—were opened, inspected, and counted or rejected, according as the court conceived them to be legal or illegal because of certain marks which appeared thereon, or for other reasons. There were twenty-one ballots to the counting of which objection was interposed either by the plaintiff or the defendant, because they were claimed to be illegally marked, and these have been brought here with the record for the purpose, of course, of facilitating a determination of the question by this court whether the objections to the rulings of the trial court with respect thereto are or are not sustainable.

There were, in addition to the objections to certain ballots as above stated, some other propositions affecting the result of the vote for supervisor in said district which were submitted to and decided by the trial court. These propositions are: 1. Whether one Katie Logan, who voted at said election and cast her ballot for the plaintiff, was a qualified voter within the contemplation of that portion of section 1 of article II of the constitution which prescribes an educational test as one of the prerequisites to the right to the exercise of the privileges of an elector; 2. Whether, upon the question of residence, certain persons who voted at said election were legally entitled to vote in the precinct in which they cast their ballots.

For convenience and the purposes of the discussion of the points made for and against the respective parties, counsel, in their briefs, have grouped the above-stated propositions under two heads, viz.: "Marked Ballots" and "Illegal Votes." The former refer, manifestly, to those ballots to which objection was made upon the ground that they contained distinguishing marks—that is, marks by which the voters casting them would be enabled to identify them as their ballots. The latter refer to the vote of said Katie Logan and to those votes cast by persons who, it is claimed, were not legal residents of the precinct in which they voted at the time of said election.

In this opinion we will adopt the method thus pursued by counsel.

1. There were five ballots cast for the defendant and which were rejected by the court as containing "distinguishing marks." Of these counsel for the contestee concede that three were properly rejected by the court as bearing upon their face certain marks which, under the law, must be regarded as distinguishing marks and, therefore, invalid. The remaining two ballots cast for the defendant but rejected by the court (referring to the ballots as they were marked for identification or as exhibits at the trial) are: "Yocolumne (precinct) 15" and "Slough (precinct) 17." The rulings as to these ballots counsel characterize as erroneous, but we think the court properly rejected them. The objection to "Yocolumne 15" is that the cross made by the voter with the voting stamp was placed immediately to the right of the name of one of the legislative candidates and not in the voting square. An inspection of the ballot discloses that the voter thus marked the ballot. That this constituted a distinguishing mark under the law (Pol. Code, sec. 1205) as it now exists and has been interpreted, there can be no doubt. (See *Bass v. Leavitt*, 11 Cal. App. 582, [105 Pac. 771].) The case of *Tebbe v. Smith*, 108 Cal. 101, [49 Am. St. Rep. 68, 29 L. R. A. 673, 41 Pac. 454]), cited by the defendant in support of his position that the ballot marked as indicated is not invalid for the reason stated, is not an authority under the law as it now reads, section 1205 of the Political Code having been amended since the decision in that case, so that said section is now reasonably susceptible of no other construction in regard to the marking of ballots than that given it in *Bass v. Leavitt*, 11 Cal. App. 582, [105 Pac. 771]. Said section of the Political Code is mandatory, and a voter must, before casting his vote, prepare his ballot strictly according to the requirements of the law as it is therein promulgated. It may here be remarked, in this connection, that the trial court, for precisely the same reason, rejected two ballots cast for the plaintiff, and, as counsel for the latter suggest, if it might justly be held that the court erred in its ruling against the defendant as to the particular ballot under consideration, no prejudice could have resulted therefrom to the latter.

The other ballot, "Slough 17," contains a distinct mark in this form, <, between the words "amend" and "section" in the fourth proposition or referendum petition submitted for the consideration of the voters at said election. The mark has the appearance of having been made by means of the voting stamp, although, as is manifest, it is not the full or complete impression of the stamp. From its position on the ballot with reference to the other marks made thereon by the voter with the voting stamp, it is plain that the mark objected to could not have been an offset or, to be more explicit, a transfer from a mark properly made due to the folding of the ballot. The mark referred to being distinct and in a place on the ballot where it does not properly or legally belong, it cannot be held to be anything less than a distinguishing mark, which, as the trial court properly held, has the effect of vitiating or rendering void the ballot.

There were six ballots cast for the plaintiff which, over objection by the defendant, were counted. These ballots were marked for identification as "Barry 5," "Barry 6," "Rome 8," "Yocolumne 16," "Slough 19," and "Barry 21." It is not considered necessary specifically to review the objections to these ballots. It is deemed sufficient to say, as to said ballots, that they have been carefully examined by the light of the objections urged against them at the trial, and that we have been unable to discover or discern any legal objection to them. It may be said of them generally that the marks which they contain and which were pointed out as a means whereby they might be identified by those voting them consisted either of mere blurs which were evidently caused by the awkward handling of the ballots as they were being marked and folded or of offsets—that is, the transference of the mark of the voting stamp, through the folding of the ballot before the ink became dry, to the part of the ballot where such mark would naturally strike when the ballot was folded as required before presenting it to the proper election officer to be by him deposited in the ballot box. This is particularly true as to the ballots, "Barry," 5 and 6, which counsel for the defendant with special emphasis insist should not have been counted, the objection to "Barry 5," being based upon what clearly appears to be a blur in the space containing the word "Yes," opposite a referendum proposi-

tion presented to the voters, and the objection to "Barry 6" being founded on what plainly appears to be a transfer of the mark, properly made in the voting space opposite the name of the republican candidate for Congress, to that part of the ballot against which said mark naturally pressed by the folding of the ballot, such folding having evidently been done before the drying of the ink in the voting square above mentioned. As to the ballot marked for identification "Rome 8," it may be observed that the record shows that the objection thereto by the defendant was withdrawn by him at the trial.

The above observations with respect to the defendant's objections to the ballots cast at the election and by the court counted for the plaintiff apply with equal pertinency to the objections urged by the plaintiff against the counting for the defendant of certain ballots cast for him at said election. In other words, the challenged ballots which were counted for the defendant contained nothing indicative of an intention on the part of the voters to so mark said ballots as to admit of their identification, the marks objected to amounting only to blurs or offsets similar to those described above in referring to like objections interposed to the ballots cast and counted for the plaintiff. In a word, a careful inspection of each of the ballots sent to this court with the record compels the conclusion that there is no just or legal ground for any of the objections, whether by the plaintiff or the defendant, to the rulings of the court in disposing of said ballots. In other words, we are satisfied that the rulings of the court with respect to "Marked Ballots" were and are, under the law as it now exists, legally unimpeachable.

2. And we are satisfied with the conclusion of the trial court upon the claim of the plaintiff that certain votes cast for the defendant were not legal votes.

The written opinion of the learned trial judge, in which he discusses and disposes of the objections under the head, "Illegal Votes," is incorporated into the record. We approve what he has to say in said opinion and the conclusion arrived at by him from the facts in each of the cases of illegal votes claimed by the plaintiff. We are further satisfied that, in said opinion, he correctly states the law as applicable to each of said cases. We will, therefore, adopt the portion of

his opinion which bears upon the objections now under consideration. Before doing so, however, it may be well to remark, concerning the objection raised by the defendant to the vote of Katie Logan, hereinbefore referred to, that the constitution of this state (art. II, sec. 1,) provides, among other things, that "no person who shall not be able to read the constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this state; provided, that the provisions of this amendment relative to an educational qualification shall not apply to any person . . . who shall be sixty years of age and upwards at the time this amendment shall take effect." It should further be stated that the court received evidence of the age of Mrs. Logan, who admitted her inability to read and write, and found that, at the time of the adoption of the amendment of the constitution just quoted, she was under the age of sixty years. Mrs. Logan did not appear to know her own age and, upon her testimony and her personal appearance, the trial court reached the conclusion above indicated. This finding is conclusive upon this court.

The part of the opinion of the trial judge referred to and which we approve and adopt reads as follows:

"The vote of Katie Logan was assigned by the defendant as an illegal vote, on the ground that she was unable to read or write and that at the time of the adoption of the constitutional amendment requiring such qualification she was under the age of sixty years. It was shown without conflict that she is unable to read or write. She did not know her own age and seemed to have no appreciation of the value of numbers, but from her appearance and the facts related by her it appears that she is under the age of sixty years, and therefore her vote must be held to be illegal, and the evidence showing that she voted for the plaintiff his total vote must be reduced accordingly.

"A. T. Spencer's residence is partly in the fourth and partly in the third supervisorial district, the dividing line running through the dwelling-house, the greater part of the dining-room being in the third district and the other rooms in the house being either wholly or in greater part in the fourth district. Under the authorities hereinafter cited it

appears clear that Mr. Spencer had the legal right to vote in Rome precinct of the fourth district. The fact that he had theretofore illegally voted in Cranmore precinct in the third district cannot affect his right to vote in the precinct of which he is legally a resident. He was, of course, mistaken in the assumption that he had the right to vote in either precinct at his election, or that he could vote alternately in the two.

"The plaintiff alleged that R. L. Smart, Jess Brown, G. C. Carter and C. W. Stackhouse were illegal voters and that they cast their votes for the defendant. They were employed as farm laborers on the Spencer-Bailey Ranch lying partly in each of the two supervisorial districts. The residence or dwelling-house of the owners has already been referred to as being situate on the boundary line between the two districts. Mr. Smart slept in a small house about one hundred and fifty feet north of the boundary line between the two districts and within the said Cranmore precinct in the third district. The three other men slept in a bunkhouse which was also north of the boundary line and wholly in Cranmore precinct. All of the men ate their meals in the dining-room of the main dwelling-house but generally had access to the dwelling-house for no other purpose. When not at work or at their meals they spent their time at their sleeping quarters. From these facts the court must determine whether they were legal voters of Rome precinct.

"These men were all unmarried and without permanent homes in the ordinary sense. Their residence must be determined by rules somewhat more liberal than are applicable in cases of married men, or men with families. Yet the statute is the same for the determination in both cases.

"That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning."

"While there are various other rules for determining the question of residence they have no application except in cases of men with families.

"A few authorities have a more or less bearing on the question in hand.

"In the case of *East Montpelier v. City of Barre*, 79 Vt. 542, [10 L. R. A. (N. S.) 874, 66 Atl. 100], the facts were as follows:

"The line passed diagonally through the house, leaving about six-sevenths of it in Barre town. The rear entrance was in Barre town, and the front entrance in Barre City. On the ground floor there was a kitchen, which was the general living-room, a bedroom, a pantry, and a woodshed. The woodshed and pantry were wholly in Barre town, and all of the bedroom except a small triangular section. The line ran diagonally through the kitchen, leaving a corner of the stove in Barre City. This is all we have regarding the construction and occupancy of the building.

"A man's dwelling-house is the building in which he lives and in a case like this the legal *status* of the building as a dwelling place must be determined by the location of that part of the structure most closely connected with the primary purposes of a dwelling. Upon this view, the facts reported place North's house in the new town of Barre.'

"In the case of *Chenery v. Aaltham*, 8 Cush. (Mass.) 327, the rule is laid down as follows:

"Where a dwelling-house is so divided by the boundary line between two towns as to leave that portion of the house in which the occupant mainly and substantially performs those offices which characterize his home, (such as sleeping, eating, sitting, and receiving visitors,) in one town, he is a citizen of that town, and has no right to elect to reside and be taxed for his personal property in the other town.'

"In *Abington v. Bridgewater*, 23 Pick. (Mass.) 170, the court say:

"It (domicile) depends not upon proving particular facts but whether all the facts and circumstances taken together, tending to show that a man has his home or domicile in one place, overbalance all the like proofs, tending to establish it in another; such an inquiry, therefore, involves a comparison of proofs, and in making that comparison, there are some facts, which the law deems decisive, unless controlled and counteracted by others still more stringent. The place of a man's dwelling-house is first regarded, in contra-distinction to any place of business, trade or occupation. If he has more than one dwelling-house, that in which he sleeps or

passes his nights, if it can be distinguished, will govern. And we think it settled by authority, that if the dwelling-house is partly in one place and partly in another, the occupant must be deemed to dwell in that town in which he habitually sleeps, if it can be ascertained. Lord Coke, in 2 Inst. 121, comments upon the statute of Marlbridge respecting courts leet, in which it says, that none shall be bound to appear . . . " "but in the baliwicks, where they be dwelling." " " His lordship's comment is this: " " "If a man have a house within two leets, he shall be taken to be conversant where his bed is, for in that part of the house he is most conversant. . . . " " " It is then an authority directly in point to show, that if a man has a dwelling-house, situated partly within one jurisdiction and partly in another, to one of which the occupant owes personal service, as an inhabitant, he shall be deemed an inhabitant within that jurisdiction, within the limits of which he usually sleeps.'

"The authorities are well summed up in 14 Cyc. p. 851, as follows:

" 'When the boundary line between two localities passes through the residence of one whose domicile is at issue, if the portion of the house on one side of the line is sufficient to constitute a habitation by itself while the other portion is not, the first will be considered the domicile. If the line divides more equally, then that portion is deemed the domicile where the occupant mainly and substantially performs those offices which characterize his home (such as sleeping, eating, sitting, and receiving visitors); but in the event of a still closer division, then that part where he habitually sleeps is so considered in the absence of other facts showing a positively contrary intention.'

"I do not take it that the place where one sleeps is necessarily conclusive but in the absence of more satisfactory proof it is determinative of the question of residence. In the case of the four men working on the Spencer-Bailey Ranch, the place where they sleep, under the circumstances shown by the evidence, is determinative of their right to vote in the one precinct or the other, because their bunkhouse and cabin have more of the characteristics of a domicile than any other place disclosed by the evidence.

"The evidence shows that these four men voted for the defendant, and therefore his total vote must be reduced by four."

For the reasons stated herein, the judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 10, 1914, and the following opinion then rendered thereon.

THE COURT.—A petition for a hearing in this court after decision by the district court of appeal of the third district is denied. We are not to be understood as approving the portion of the opinion relating to two ballots marked respectively "Yocolumne (precinct) 15" and "Slough (precinct) 17," rejected by the trial court as bearing distinguishing marks. (See Pol. Code, sec. 1211, subd. 4.)

As appears from the opinion, the trial court rejected two ballots cast for plaintiff for the same reason that it rejected the ballot marked "Yocolumne (precinct) 15," with the result that no prejudice was suffered by reason of the rulings complained of.

[Civ. No. 1310. Second Appellate District.—December 13, 1913.]

W. H. HARRELSON, Appellant, v. ORO GRANDE LIME AND STONE CO. (a Corporation), et al., Respondents.

EMINENT DOMAIN—LEASED PREMISES—VALUE OF LEASEHOLD AND OF RIGHT TO REMOVE BUILDINGS—AWARD MADE BY JUDGMENT—PRESUMPTION.—Where the judgment in eminent domain proceedings awards a certain amount to the owner of the property and a certain amount to his lessees, who have the right, under the lease, to remove the improvements at the end of the term, it will be presumed, in a subsequent action on the lease to recover rent, wherein the lessees set up as a counterclaim that the award to them did not include the value of the right to remove the improvements, that in the judgment in the condemnation proceedings the rights of all parties

interested in the property condemned, whether as owners or lessees, were fully and correctly determined, and the value of each particular interest fixed and award thereof made to the owner.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Stephens & Stephens, for Appellant.

Sheldon Borden, and George H. Moore, for Respondents.

SHAW, J.—This action was brought to recover from defendants four hundred and fifty dollars, alleged to be due under the terms of a written lease as rental for certain real estate. Defendants answered admitting default in the payment of rent as alleged, but in defense of the action they set up a counterclaim in the sum of three hundred and seventy-four dollars, paying plaintiff the difference between the four hundred and fifty dollars sued for and the amount of the alleged counterclaim.

The question involved at the trial was the right of defendants to recover upon the counterclaim. Judgment went for the defendants, from which, and an order denying his motion for a new trial, plaintiff appeals.

The counterclaim grows out of the following facts: On January 22, 1902, plaintiff executed to defendants Stimson and Fleming a lease of a parcel of land in the city of Los Angeles, for a term of ten years. The lessees erected buildings and made improvements upon the property, and thereafter, without assigning the lease, sublet the same to defendant Oro Grande Lime and Stone Company, of the capital stock of which Stimson and Fleming were the sole owners, to which they sold the buildings. The lease contained a provision as follows: "The lessees shall have the right, upon the termination of this lease, to remove all buildings and improvements placed by them upon said premises, unless they shall forfeit their right to remove the same, as hereinafter provided." On December 12, 1905, the city of Los Angeles commenced proceedings to condemn a portion of the prop-

erty described in the lease. While the Lime Company was not made a party to this proceeding, its sole owners, Stimson and Fleming were parties and represented by attorneys at the hearing before the referees. Moreover, an award made as to the leasehold interest was received and receipted for by the Lime Company; so the fact that it was not formally made a party, so far as this action is concerned, is unimportant. On January 10, 1908, the referees filed their report and finding, whereby it was made to appear that plaintiff was the owner of the land and that Stimson and Fleming had a leasehold interest therein as shown by the lease hereinbefore referred to. They further found that the value of the parcel of land sought to be condemned was \$8,236; that the value of the improvements thereon was \$374; and that the damage to the portion of the property not condemned was \$794, making a total of \$9,404. Of this sum \$8,404 was awarded to plaintiff as owner of the land, and one thousand dollars was awarded to Stimson and Fleming as "owners and holders of a leasehold interest" therein. At the hearing of this report an interlocutory decree was duly entered in accordance therewith, from which no appeal was taken, and final judgment followed.

We must presume that in this final decree the rights of all parties interested in the property condemned, whether as owners or lessees, were fully and correctly determined and the value of each particular interest fixed and award thereof made to the owner. The interest of defendants was a leasehold the value of which was fixed at one thousand dollars. In arriving at this value the referees had access to and presumably considered the lease, which showed defendants' right to the buildings, for the purpose of ascertaining the value of defendants' interest thereunder. This interest consisted, among other things, of the unexpired term of the lease, together with the right at the expiration thereof to remove the buildings. The one thousand dollars awarded covered the value of the right to remove the buildings as fully as it covered the unexpired term of the lease, and hence respondents might with equal propriety claim that the latter item of value was not included in the leasehold interest, for which the one thousand dollars was awarded, as to insist that the right to remove the buildings was not so included. Both arose under the

provisions of the lease, without which neither right could be asserted, and each constituted a part of the leasehold going to make up the interest in the property, for all of which interests defendants were awarded the said sum of one thousand dollars. It follows that the defendants were not entitled to the counterclaim.

The judgment and order are reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1427. Second Appellate District.—December 13, 1913.]

THOMAS E. NEWLIN, Executor of the Will of George R. Myers, Deceased, Respondent, v. R. H. MYERS, Appellant.

PLEDGE OF CORPORATE STOCK—INTERPRETATION OF CONTRACT—ACTION BY PLEDGOR TO COMPEL REDELIVERY OF SHARES—PAYMENT AS CONDITION PRECEDENT.—Where the owner of corporate stock pledges it under an agreement to protect the pledgee against all loss, expense, and liability which he may incur in the matter of a pledge of stock to him made by another stockholder, the pledgee is not entitled, in an action against him by the first pledgor to recover the shares of stock, to payment from such pledgor, as a condition to redelivery of the stock, of moneys voluntarily paid out and expended by the pledgee in a wrongful and futile attempt to hold the stock of the second pledgor. The loss, expense, and liability against which the first pledgor agreed to protect the pledgee in entering into the contract with the second pledgor was such only as he might incur, under and by virtue of the terms of that contract, and not by reason of acts on the part of the pledgee and expenditures made wholly without the terms of the agreement.

APPEAL from a judgment of the Superior Court of Los Angeles County. C. A. Raker, Judge presiding.

The facts are stated in the opinion of the court.

Harold A. Gilman, and Tanner, Taft & Odell, for Appellant.

Sheldon Borden, and Gurney E. Newlin, for Respondent.

SHAW, J.—Action to recover certain shares of corporate stock pledged by plaintiff's testate to defendant. Judgment went for plaintiff, from which defendant appeals upon a reporter's transcript.

The suit was instituted by George R. Myers, who thereafter died, and Thomas E. Newlin, as executor of his estate, was substituted as plaintiff.

The following facts shown by the uncontradicted evidence, or allegations of the complaint not denied, appear: That on December 29, 1903, the Sanitary Laundry Company was a corporation, the capital stock of which was distributed and held as follows: Plaintiff's testate, George R. Myers, 198 shares; J. H. Keifer, 198 shares; Emma B. Myers, 1½ shares; Laura Keifer, 1½ shares, and Sheldon Borden, 1 share. The corporation was in financial distress and without funds to meet its obligations, some of which were held by said George R. Myers, but neither he nor Keifer was able to make further advances to the company. Defendant was a cousin of George R. Myers and engaged in the practice of law, and theretofore had acted as his attorney and confidential legal adviser. Upon being made acquainted with the financial condition of the corporation, defendant, at the request of George R. Myers, agreed to assist him in financing the company, "claiming that in so doing he was actuated by a desire to aid and benefit the plaintiff on account of their relations aforesaid, and solely by reason of their said relations and of the relationship and previous intimacy existing between them as aforesaid." Thereupon, negotiations were initiated with the result that Keifer assigned, transferred, and delivered to defendant the 198 shares of the capital stock so owned by him, which transfer and delivery was made in accordance with a duly executed written agreement made between Keifer and defendant, wherein it was recited: That said Keifer had sold, assigned, and transferred to R. H. Myers one hundred and ninety-eight shares of stock and that R. H. Myers was the owner and holder thereof; that said stock was pledged to the Broadway Bank & Trust Company as additional security for the payment of a certain promissory note of four thousand five hundred dollars, executed by Keifer and his wife, which said note was also secured by a mortgage of real estate; that said laundry company during the time Keifer was a stock-

holder had become largely indebted to George R. Myers for moneys by him loaned to said company; that said R. H. Myers had loaned and advanced, and would thereafter loan and advance, divers sums of money to discharge a part of the indebtedness of the said company in order to save it from bankruptcy, and to pay such of the operating expenses as might be necessary for the best interests of the company; that said Keifer desired an option to purchase the one hundred and ninety-eight shares of said stock, and wherein said R. H. Myers covenanted and agreed to sell to Keifer, within one year, time being made the essence of the contract, one hundred and ninety-eight shares of said stock, upon Keifer making payment to R. H. Myers of: 1. All moneys paid to said Bank & Trust Company by R. H. Myers on account of the note of Keifer, for the payment of which said stock was held as collateral security; 2. One-half of all moneys theretofore or thereafter, up to the exercise of the option, advanced to said company by R. H. Myers, less any payments made thereon by said company; 3. One-half of all moneys theretofore loaned to said laundry company by said George R. Myers, less all payments made thereon by said company; and, 4. Interest on said sums at seven per cent per annum. It was further provided that an accounting for any dividends paid upon said stock should be made and credited to Keifer at the time of his exercising said option to purchase. By said contract R. H. Myers further covenanted to advance to the company from time to time such sums of money, not exceeding four thousand dollars, as might be necessary to save the company from bankruptcy. At the same time, and with the consent of Keifer, an agreement in writing was made between said bank and R. H. Myers, whereby the bank agreed to deliver the one hundred and ninety-eight shares of stock so pledged to it by Keifer to the said R. H. Myers at any time upon his paying the sum of one thousand dollars, to be applied on Keifer's indebtedness to said bank, and the delivery to the bank of an agreement on the part of R. H. Myers to pay any deficiency, not exceeding seven hundred and fifty dollars, which might remain upon Keifer's note after exhausting the real estate so held by it as security for the payment thereof.

At the request of the defendant, said George R. Myers, at about the same time, to wit, December 29, 1903, transferred

and delivered the one hundred and ninety-eight shares of stock so held by him to defendant. A year later, on December 29, 1904, said George R. Myers and defendant entered into a contract as follows:

"George R. Myers, of Los Angeles, California, hereby acknowledges the transfer and delivery to him to R. H. Myers of Redlands, California, on or about the 29th day of December, 1903, of 198 shares of the capital stock of the Sanitary Laundry Co., a corporation, and that said stock was so transferred and pledged to said R. H. Myers to secure the said R. H. Myers for services to be rendered, and against all loss, expense and liability he might incur by reason of his purchasing from J. H. Keifer an equal number of shares of the capital stock of the Sanitary Laundry Co. and entering into an agreement dated the said 29th day of December, 1903, with the said J. H. Keifer.

"Said transfer and pledge was made and said stock has at all times been retained by said R. H. Myers with the understanding and agreement between them, that when he was paid for his services and expenses and became satisfied that he was discharged from all obligations by reason of his assumption of J. H. Keifer's responsibilities as a stockholder in the said Sanitary Laundry Co., that said stock was to be re-delivered and re-transferred to said Geo. R. Myers or to his order.

"The said Geo. R. Myers also agrees that \$1000 is a reasonable sum due to said R. H. Myers by reason of his services rendered and expense incurred in connection herewith to date.

"The said R. H. Myers hereby acknowledges his obligation to re-deliver and re-transfer the said 198 shares of the capital stock of the Sanitary Laundry Co. to said Geo. R. Myers, or to his order, upon receiving full satisfaction for all just claims and demands he may have, either against the sanitary Laundry Co., or to the said Geo. R. Myers, and release from all obligations and liabilities because of his becoming a stockholder in the said corporation as aforesaid.

"In witness whereof the said parties hereto have hereunto set their hands this 29th day of December, 1904.

"G. R. MYERS,

"R. HOLBY MYERS."

As alleged in the complaint and not denied, this agreement was prepared and submitted to George R. Myers for his signature by defendant and, at his request, signed by the former, who "acted upon the confidence which he reposed in defendant by reason of their aforesaid relations, and by reason of the fact that he regarded defendant as his friend, relative and adviser, and as coming to his assistance in regard to the aforesaid financial embarrassment of the said corporation." "That in signing said agreement, and in transferring and delivering said pledged stock to defendant as aforesaid, plaintiff intended to and believed that he was pledging same to defendant to secure said defendant for moneys advanced and to be advanced and for services rendered and to be rendered by defendant unto said corporation as aforesaid, and also to secure defendant against any personal liability for the payment of the debts of said corporation existing at the time of the transfer unto defendant of the said stock so as aforesaid transferred to him by said Keifer, and for no other purpose, and plaintiff alleges that such intention and belief on his part was known to defendant prior to the signing of said agreement, and that he relied upon the defendant to draw an agreement for said purposes and none other."

Defendant advanced and procured to be advanced to the corporation certain money, for which the corporation made its notes bearing interest at the rate of seven per cent, for the procuring of which defendant claimed compensation in the sum of one thousand dollars, which sum, it was alleged, together with all advances made or procured to be made by defendant to the corporation, was, as alleged in the complaint, at the time plaintiff demanded a redelivery of the stock on December 27, 1907, fully paid, and defendant likewise paid and reimbursed for all services rendered and loss or expense incurred under the terms of said writing so made between defendant and said George R. Myers; and also alleged that said defendant was fully released and discharged from any and all liability to the creditors of the corporation by reason of being a stockholder therein, and that all the terms and conditions of said written agreement so made between George R. Myers and defendant, and upon the happening of which defendant agreed to redeliver the one hundred and ninety-eight shares of stock, were, prior to the commencement of the

action, fully performed and fulfilled. But defendant, although requested so to do, refused to redeliver the stock and detains the same from plaintiff.

The answer admits the execution of this agreement between George R. Myers and defendant, denies performance of the conditions under which the stock was pledged, and alleges "that in and by said written agreement so entered into by and between plaintiff and defendant it was expressly covenanted and agreed by the parties to said agreement that the plaintiff's one hundred and ninety-eight shares of stock in said corporation should be, and the same was, transferred and pledged unto this defendant to secure this defendant for services to be rendered, and also against all loss, expense, and liability which he, this defendant, might incur by reason of his purchasing from the said J. H. Keifer an equal number of shares of the capital stock of the said corporation, viz.: 198 shares"; and that by reason of purchasing from said Keifer said one hundred and ninety-eight shares of the capital stock of said corporation he incurred loss, liability and expense in the sum of five thousand dollars, no part of which has been paid, and which sum is still secured by the stock so pledged to him under the terms of said agreement. By an amended and supplemental answer filed after the death of George R. Myers, defendant alleged that in accordance with the terms and conditions of the agreement dated December 29, 1904, he rendered services, expended money, and sustained loss by reason of the purchase of Keifer's one hundred and ninety-eight shares of stock, and by reason of claims and demands against the Sanitary Laundry Company and said George R. Myers, in the sum of \$4,719.38, as shown by an itemized statement of account attached as an exhibit to said amended and supplemental answer, a claim for which was duly presented to the executor of the estate of deceased and by him rejected.

The court found that it is not true that by reason of defendant's purchasing from Keifer the one hundred and ninety-eight shares of stock he incurred loss, expense, or liability in any sum whatsoever; that it is not true that in accordance with the terms and conditions of the agreement between George R. Myers and defendant, dated December 29, 1904, defendant rendered services, expended money, or sus-

tained loss in any sum by reason of the purchase from Keifer of the one hundred and ninety-eight shares of stock, or by reason of claims or demands against the Sanitary Laundry Company or the said George R. Myers, he rendered services, expended money, or sustained loss in the sum of \$4,719.38, or in any sum whatever; that it is not true that the moneys, or any part thereof, alleged to have been expended by defendant, were paid out in accordance with the said contract, or that the same or any part thereof constituted or were losses or damages sustained by defendant under the terms or conditions of said contract; and the court found all the allegations of the complaint to be true.

The only allegation of the complaint as to which an issue is joined by denials contained in the answer is that wherein it is alleged that prior to the commencement of the suit plaintiff fully performed all the conditions of the contract, by reason whereof he was entitled to the redelivery of the stock. Except as to the finding in favor of plaintiff upon this issue, defendant is in no position to complain of the finding that all the allegations of the complaint are true, since other allegations thereof are deemed to be admitted.

It is conceded that prior to the demand made to redeem the stock by plaintiff, defendant had been discharged from all liability as a stockholder to the creditors of the corporation, and that prior thereto all demands against the corporation due to defendant had been fully satisfied and discharged. Hence, since these conditions were performed, they may be eliminated from a consideration of the contract upon which defendant bases his claim to retain possession of the stock.

Referring to the contract of December 29, 1904, it is recited that the stock was pledged to defendant to, first, secure him "for services to be rendered." While this paragraph is silent as to the nature of the services, as well as in stating for whom the service was to be rendered, it is clear from the last paragraph of the contract, since defendant therein acknowledged his obligation to redeliver the stock "upon receiving full satisfaction for all just claims and demands he may have against . . . George R. Myers," that the "services to be rendered," mentioned in the first paragraph, referred to and contemplated services to be rendered for George R. Myers, as well as for the corporation. The second condition of the

pledge was to secure defendant against "all loss, expense, and liability he may incur by reason of his purchasing of J. H. Keifer an equal number of shares of the capital stock of the Sanitary Laundry Co." Defendant, however, never purchased the stock or any stock in said company; hence no claim for loss, expense, or liability could be predicated upon this covenant. The third condition of the pledge was to secure defendant against loss, liability, and expense incurred by him in entering into an agreement dated the twenty-ninth day of December, 1903, with J. H. Keifer. This agreement, the substance of which is hereinbefore stated, was one wherein and whereby Keifer pledged to defendant one hundred and ninety-eight shares of stock to secure the performance of certain conditions (*Keifer v. Myers*, 5 Cal. App. 668, [91 Pac. 163]), all of which acts, covenants, and conditions said Keifer fully performed, as determined in a suit brought by Keifer against R. H. Myers for the redemption of said stock so pledged, and wherein an accounting between Keifer and this defendant was had and mutual and appropriate remedies accorded to each. (*Keifer v. Myers*, 14 Cal. App. 338, [111 Pac. 1038].)

This brings us to the point of the controversy. Notwithstanding the agreement made with Keifer was a contract of pledge to secure the performance of certain acts on the part of Keifer therein specified, and all of which were fully performed, defendant refused, upon demand of Keifer, to redeliver the stock so pledged; whereupon Keifer brought suit to compel a redelivery thereof. Defendant resisted this action, wrongfully claiming that the contract with Keifer constituted a sale by the latter to him of the one hundred and ninety-eight shares of stock. In an effort to sustain his contention and retain possession of the stock, he prosecuted two appeals from the decision of the superior court, wherein it was fully determined that Keifer was entitled to the redemption of the stock. After Keifer demanded his stock and made tender of the balance due on account of the pledge thereof, defendant voluntarily paid to the Broadway Bank & Trust Company certain moneys to be applied upon Keifer's notes, which sums it was held in the trial of *Keifer v. Myers* he could not recover, since the payment was voluntarily made. (*Keifer v. Myers*, 14 Cal. App. 338, [111 Pac. 1038].) Not-

withstanding such decision, defendant now insists that plaintiff be required to pay the same with interest, together with a further sum of \$2,656.80, which defendant alleges he paid out or assumed payment thereof in his wrongful and futile effort to hold the Keifer stock pledged to him, payment of which sums so voluntarily paid to the bank and that paid out in litigation he demands from plaintiff as a condition of redelivering the stock.

The loss, expense, and liability against which George R. Myers agreed to protect defendant in entering into the contract with Keifer was such only as he might incur under and by virtue of the terms of that contract, and not by reason of acts on the part of defendant and expenditures made wholly without the terms of the agreement. If, as held in the trial of the case of *Keifer v. Myers*, defendant could not under the contract recover from Keifer moneys voluntarily paid to the bank for his account, then, in the absence of some specific provision in the contract made with George R. Myers, he could not recover the same from plaintiff. This is equally true with respect to moneys paid out in litigation, since, if defendant had complied with Keifer's just demand, when accompanied by a tender of all that was due upon the contract, such payments would have been unnecessary. The disbursements were made and expenses incurred by reason of acts of the defendant unwarranted by the terms of the Keifer contract and for which George R. Myers, under the terms of his contract, was in no wise liable.

If in enforcing the contract of pledge the proceeds of the sale of the Keifer stock were insufficient to repay defendant for advances made thereunder, a loss would follow; if it became necessary to initiate proceedings to enforce the contract in accordance with its terms, incidental expense would follow, and since the contract contemplated that defendant *might*, as to the bank at least, occupy the position of a stockholder, he might by reason thereof incur liability; all of which were contingencies upon the happening of which just claims and demands would arise in defendant's favor, and against George R. Myers.

While in our opinion the terms of the contract are, when read in connection with the Keifer contract, clear and unequivocal, appellant nevertheless insists that the contract is

uncertain and ambiguous as to what was intended by the words "loss, expense, and liability" against which defendant was to be protected. Upon this theory defendant was permitted to introduce extrinsic evidence consisting of letters and oral testimony touching the situation of the parties and the practical construction given by them to the contract. Such evidence merely tends to show that, while George R. Myers had no pecuniary interest in the result of the litigation between Keifer and the defendant, his sympathies were with the latter; that through the bookkeeper of the company defendant was informed on several occasions as to Keifer's expressed intention to examine the books of the corporation, and that said bookkeeper consulted defendant's attorney with regard to the propriety of permitting such examination; that defendant's attorney stated to George R. Myers that according to his interpretation of the contract the latter would be liable for the expense of the litigation. But it does not appear that George R. Myers ever assented to such interpretation; on the contrary, the evidence is wholly consistent with a contrary view. That George R. Myers asked defendant for a copy of the Keifer contract, which he submitted to his own attorneys and from whom he obtained an opinion as to Keifer's rights thereunder; that as early as March 24, 1905, and prior to the commencement of the Keifer suit, George R. Myers, through a letter written to defendant, stated that he intended to remain absolutely neutral in the matter and that he did not want his name used in connection with it. Naturally, George R. Myers, who was interested in the corporation to the extent of one-half thereof, was interested as to the ownership of the other half. Without further reviewing the evidence adduced, suffice it to say that a careful examination thereof fails to show any acts on the part of George R. Myers, or any statements made by him, which could warrant the court in construing the contract in accordance with appellant's contention. Such interpretation, whereby the estate of George R. Myers would be required to reimburse defendant in the sum of \$4,719.38, a large part of which, without any obligation so to do, was voluntarily paid by defendant for the benefit of another, and the remainder of said sum expended in litigation whereby defendant sought to wrongfully retain possession of the Keifer stock, and in the result

of which litigation said George R. Myers had no pecuniary interest, is wholly at variance with the admitted fact that when defendant prepared the draft of the contract of December 29, 1904, and procured the signature of George R. Myers thereto, he was his confidential adviser and avowed friend, desirous of helping him.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1151. Third Appellate District.—December 16, 1913.]

J. D. PAYNE et al., Appellants, v. W. W. WARD et al.,
Respondents.

DRAINAGE ACT—ADJUSTMENT OF ASSESSMENT BY BOARD OF EQUALIZATION—REVIEW BY COURTS.—Under the Drainage Act (Stats. 1885, p. 204; 1891, p. 262; 1909, p. 25) the action of the board of equalization in adjusting an assessment is not conclusive upon the landowners, but is subject to review by the courts.

ID.—DRAINAGE ASSESSMENTS—MANNER OF LITIGATING VALIDITY—ACTION TO RESTRAIN FORECLOSURE.—The litigation of the validity of the assessment may be had in an action brought by the property owners themselves to nullify the action of the board of equalization and to restrain the trustees from bringing suits to foreclose the liens of the assessment.

APPEAL from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

Goodfellow, Eells & Orrick, and Drew & Drew, for Appellants.

L. L. Cory, M. K. Harris, and L. B. Hayhurst, for Respondents.

BURNETT, J.—In an action brought to restrain them as trustees of the "Ward Drainage District" from bringing suits to collect from plaintiffs certain alleged illegal assess-

ments, the judgment was in favor of defendants from which the appeal has been taken. It is not disputed that said district was regularly established in accordance with and by virtue of the provisions of an act of the legislature to promote drainage, approved March 18, 1885 (Stats. 1885, p. 204), as amended in 1891 (Stats. 1891, p. 262), and also in 1909 (Stats 1909, p. 25), whereby a legislative scheme was provided for the drainage of other than swamp and overflowed lands. For a discussion of various legal phases of this legislation and a comparison of it with the Reclamation Act of 1868, we may refer to the opinion of the supreme court in the case of *Laguna Drainage District v. Charles Martin Co.*, 144 Cal. 209, [77 Pac. 933], and wherein its validity is upheld but therein no consideration was devoted to the main question involved herein, which is, Was evidence admissible to prove "that the assessment of the commissioners was disproportionate to the expense of the works and the benefits to be derived therefrom?"

Section 13 of said Drainage Act, after providing for the preparation of a list of the charges assessed by the commissioners against each tract of land and designating specifically what such list must contain, proceeds to direct that "The board of commissioners must, on the completion of such list, cause a notice to be published in some paper published in the county where such district is situated, and also have such notice posted in three places in such district, to the effect that the board of commissioners will, in ten days from the publication of such notice, meet (and they shall also name the time and place of such meeting) as a board of equalization for the purpose of equalizing assessments, and will continue in session as long as may be necessary, not to exceed ten days, at the end of which time, having equalized and adjusted such assessments, the list must then be filed as herein provided." Then follows section 14, which, to the extent of this controversy, is as follows: "The board of trustees of the district must commence actions for the collection of such delinquent installments, and delinquent assessments, with interest thereon, and costs, and for the enforcement of the lien thereof on the land assessed, in the superior court of the county in which the lands, or some portion of it, is situated, in which action all persons claiming any interest in said land

upon which said assessment is levied, and any person necessary to a complete determination of the action, may be joined as defendants in said action. . . . In any action to enforce said lien or to determine the validity of the same, said list, duly executed by said commissioners, or a certified copy thereof, shall be *prima facie* evidence of the matters therein contained, and that said commissioners were duly appointed and qualified, as required by law, and that they did view and assess upon the lands set forth in said list the charges therein contained and that said charges are in proportion to the whole expense and the benefits which will result from the work of drainage for which said assessment was so levied."

As to the charges imposed upon the land, it could not be made more apparent than it is by the language of the statute that the following steps are contemplated: The commissioners appointed by the board of supervisors "must view and assess upon the lands situated in the district a charge proportionate to the whole expense, and to the benefit which will result from such work" and must make a list of the charges assessed against each tract of land. It is not contended that this assessment is final and that the landowners are bound by it. The next step in the procedure is the equalization of the assessments, after due notice given, by the commissioners sitting as a board of equalization. The list of assessments as thus corrected by the board of equalization must be then filed with the county treasurer and the charges thereupon become a lien upon the property.

It seems to be the contention of respondents that the action of the board of equalization in adjusting the assessments is not subject to review and is conclusive upon the landowners. If so, it should certainly appear expressly or by implication in the statute itself. We find therein, however, no hint of such intention.

In *Lower Kings River Reclamation Dist. v. Phillips*, 108 Cal. 306, [39 Pac. 630, 41 Pac. 335], it is stated: "Counsel have cited a great many cases in which it has been held that the valuation made upon land by the assessor cannot be called in question in actions to collect the tax unless the right to do so is provided by law. We are not called upon to dispute that proposition here. If an assessment has been made as the law provides, and that law does not violate the inhibition

alluded to" (denial of due process of law), "the tax has become a final charge—if the law so provides—and cannot be called in question because the valuations were erroneous."

The position of respondents as to the finality of the action of the board of equalization is also entirely inconsistent with the provision of the law as to the enforcement and collection of the assessments. By the legislation of the country two methods are provided for the collection of the various taxes assessed for governmental expenses. In one of them the property is sold by administrative officers without judicial proceedings; in the other, a decree of court must be secured, foreclosing the lien of the assessment and directing a sale of the premises. Each constitutes "due process of law," provided the landowner has an opportunity to be heard as to the apportionment of benefits. Upon the theory of respondents there is no reason why the legislature did not adopt the former method for the enforcement of the assessments of said board of equalization. The obvious purpose, however, in providing for a suit in court, was to afford an opportunity for a judicial determination of the correctness of the apportionment.

But it seems idle to pursue this method of reasoning as the legislative declaration has placed the matter beyond cavil or serious controversy. To say that the list of the charges assessed against the land "shall be *prima facie* evidence of the matters therein contained" certainly excludes the idea that it is conclusive evidence of said matters. Section 1837 of the Code of Civil Procedure defines conclusive evidence as follows: "Conclusive or unanswerable evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it." While *prima facie* evidence as defined in section 1833 of the same code "is that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence. For example: the certificate of a recording officer is *prima facie* evidence of a record, but it may afterward be rejected upon proof that there is no such record." The distinction could not be made any plainer by a thousand illustrations or by reference to the numerous decisions upon the subject.

Applying to the situation here the familiar canon embodied in section 1858 of the Code of Civil Procedure, as follows: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all," we necessarily reach the conclusion that the assessment of said board of equalization is not final but is subject to revision by the judicial tribunal designated in the statute.

Reasons could be suggested readily why the legislature should make the assessment of the local commissioners subject to correction in a judicial proceeding but we are not, of course, concerned with the policy of the law. It is sufficient to ascertain that it has been so provided.

The only debatable question, apparently, that can arise is whether the litigation of the validity of the assessment may be had in an action such as this brought by the property owners themselves to nullify the action of the board of equalization and to restrain the trustees from bringing suits of foreclosure.

In the Reclamation Act, it may be observed, there is a provision—not found in the drainage statute—contained in section 3493½ of the Political Code authorizing the board of trustees, at any time within one year after the filing of the list of charges against the land, in the name of the district, to commence and prosecute an action in the superior court of the county where the land is situated, to determine the validity of the assessment. The proceeding culminating in a judgment is outlined in said section and it is provided that "the judgment given and made in the action brought under the provisions of this section shall be conclusive between the parties thereto as to the validity or invalidity of the assessment."

In the absence of that specific direction it might be questionable whether the board of trustees could maintain such action under the Drainage Act, the course provided for therein being a foreclosure proceeding. But said section 14, in addition to foreclosure, does clearly contemplate a distinct action to determine the validity of the assessment. While not

specifically authorizing the owners of the property to maintain such action, as the real parties in interest, they are, of course, proper plaintiffs to such procedure.

Again, since the assessment made by the commissioners is a lien upon the land and this assessment is not conclusive upon the owner and is not valid or binding unless made and levied in proportion to benefits, upon well-recognized and familiar principles of equitable cognizance it plainly follows that the owner is clearly within his rights in invoking the power of the court to restrain the enforcement of the apparently valid but, in reality, *invalid* lien and to remove the cloud which has attached to his property.

We find nothing in any of the cited cases opposed to the foregoing views unless perchance in one or two that have been expressly overruled.

In *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, [28 L. Ed. 569, 4 Sup. Ct. Rep. 663], there was under consideration by the supreme court of the United States the Reclamation Act of 1868. Its validity was upheld in an opinion prepared by Mr. Justice Field. Among the interesting questions therein discussed is the legal significance of the familiar phrase "due process of law." The appellant contended that this fundamental principle was violated in the assessment of his property, "inasmuch as it was made without notice to him, or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing." In reply to this contention it was declared that, where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal than where life or liberty is involved, "and whether notice to him is at all necessary may depend upon the character of the tax and the manner in which its amount is determinable." But the complete answer to appellant's contention is manifestly found in this statement of the court: "The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the pur-

pose of reclaiming overflowed and swamp lands, can be enforced only by suits, and of course, to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. (*Reclamation District No. 108 v. Evans*, 61 Cal. 104.)” While the discussion there was addressed to a different contention from what is presented here, the availability and efficacy of the suit in court to test the validity of the assessment are unqualifiedly affirmed. And it may be said that section 3463 of the Political Code accords to the charges assessed by the commissioners under said Reclamation Act the same potency and attaches to it the same significance as evidence in the suit to enforce the lien or to determine its validity as does said section 14 of the Drainage Act to the charges assessed by said commissioners sitting as a board of equalization. The charges assessed by the former, in other words, bear the same relation to the suit in court to determine their validity as do the charges assessed and equalized by the commissioners under the Drainage Act. It is true that there is no provision for a board of equalization under the Reclamation Act as there is under the act herein but that circumstance does not affect the question before us. It simply means that the property owner in the drainage district is afforded an additional opportunity to present his grievance to the commissioners.

In *People v. Sacramento Drainage District*, 155 Cal. 373, [103 Pac. 207], the scope and purpose of such legislation are comprehensively and thoroughly discussed and the validity of the act therein involved and the conclusiveness of the assessment therein provided for are upheld, but the act therein discussed itself provides that “the decision of said board of drainage commissioners shall be final and therefore said assessment list shall be conclusive evidence that the said assessment has been apportioned according to the benefits which will accrue to each tract of land in said district.”

In *California etc. Co. v. Los Angeles*, 10 Cal. App. 191, [101 Pac. 547], the assessment made by the county assessor and equalized by the county board of equalization, to which plaintiff had successfully made an application for a reduction of its assessment, was held to be conclusive. This is in ac-

cordance with the express provision of the law found in section 3678 of the Political Code.

In *People v. Hagar*, 52 Cal. 171, it was indeed held that, in the absence of fraud, the decision of the commissioners is conclusive against the property owner. At that time, however, the law provided that "the district attorney shall proceed at once against all delinquents in the same manner as is provided by law for the collection of state and county taxes" and it was not an unreasonable inference that it sufficiently appeared to be the intention of the legislature that the assessment by the commissioners should be conclusive. However, if there is anything in that case or in *People v. Hagar*, 66 Cal. 59, [4 Pac. 951], opposed to appellants' position here, it must be deemed to have been overruled by *Reclamation District No. 108 v. Evans*, 61 Cal. 104, and in *Reclamation District v. Phillips*, 108 Cal. 306, [39 Pac. 630, 41 Pac. 335]. In the last two cases, as in the one in 111 U. S., it was held that "the assessment under consideration could by the law of California be enforced only by legal proceedings, and in them any defense going to its validity or amount could be pleaded."

In the Phillips case, a rehearing was granted after decision in department upon the point that the conclusion announced in the first opinion that "the court erred in excluding the evidence tending to prove that defendants' land was not benefited by the reclamation works, and was arbitrarily and excessively assessed without regard to proportionate benefits," was unwarranted, but the whole court adhered to the department position. The cases are therein reviewed and, while much consideration is given to the fact that the only opportunity afforded to the landowner to be heard was in defense of the action brought in court, and while the court was apparently of the opinion that without the provisions in reference to the judicial proceeding the law could not be upheld, there is nothing to indicate that had the section contained an express provision for notice the decision would have been otherwise or that the court would have undertaken to render nugatory the additional recourse plainly provided for the benefit of the property owner.

In *Swamp Land Dist. 341 v. Blumenberg*, 156 Cal. 532, [106 Pac. 369], it was held that an assessment, the regularity and original validity and binding form of which was ad-

mitted, was not rendered unenforceable by reason of certain subsequent events. It was therein declared, though, that "if the validity of the assessment has not been established in an action as provided in section 3493½ of the Political Code, all questions involving the regularity of the assessment proceedings, the amount of the charge as compared to the benefits conferred, and the fact that the cost was apportioned in proportion to the benefits, is open to investigation in defense to a suit to foreclose the assessment lien."

Of course, if the trial court in the case at bar should find that the assessment was valid, no doubt the property owners would pay it without further delay, or if not, there is no doubt under proper pleadings that a decree of foreclosure could be entered in the same suit. But, at any rate, we are assured that plaintiffs should be accorded the privilege of making the offered showing and the judgment is, therefore, reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1176. Third Appellate District.—December 16, 1913.]

CARL VOLQUARDS, Appellant, v. JOHN H. MYERS,
Executor of the Will of Lillie Sophia Volquards, Also
Known as Lillie Sulsberg Volquards, Deceased, Respond-
ent.

HUSBAND AND WIFE—CONVEYANCE OF PROPERTY TO BOTH—PRESUMPTION OF TENANCY IN COMMON.—While it is true that the presumption established by section 164 of the Civil Code, that a married woman takes the part of property conveyed to her and her husband as tenant in common unless a different intention is expressed in the instrument, is not conclusive and may be disputed and overthrown by other testimony, nevertheless the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony.

ID.—DISPUTABLE PRESUMPTION—SUFFICIENCY OF EVIDENCE TO OVERCOME—REVIEW ON APPEAL.—Whether or not, in any case, a disputable presumption has been dispelled by testimony received in

rebuttal thereof, is a question whose solution is solely with the trier of the facts, and while a trial court or jury cannot arbitrarily accept a disputable presumption as against other testimony received in direct opposition thereto, yet, unless it is clearly and unmistakably made to appear that an arbitrary course in that regard has been followed by the trial court or jury, it does not rest within the legal power or right of an appellate court to say that the presumption should have been rejected as having been dispelled by the evidence set up against it.

ID.—PRESUMPTION THAT WIFE HOLDS AS TENANT IN COMMON—INSUFFICIENCY OF HUSBAND'S TESTIMONY TO OVERTHROW.—In this action by a husband against the executor of the will of his deceased wife to establish his claim of sole ownership to real estate conveyed to him and to her during her lifetime, the trial court did not abuse its discretion in holding that the testimony of the husband that he purchased the property with his separate money and gave his wife no interest therein was not sufficient to overcome the presumption that she was owner of an undivided one-half interest in the property.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Edgar T. Zook, Judge presiding.

The facts are stated in the opinion of the court.

Edgar C. Levey, George M. Lipman, and J. P. O'Brien, for Appellant.

E. D. Knight, for Respondent.

HART, J.—An action to determine an adverse claim to certain real property, situated in the city of San Francisco.

Judgment passed for the defendant, and the plaintiff submits this appeal from said judgment and from the order denying his motion for a new trial.

The only point made by the plaintiff is that the findings are not justified or supported by the evidence.

The land in controversy, which consists of a building lot, was, by a grant, bargain, and sale deed, conveyed to the plaintiff and his wife, Lillian Volquards, by one Wallace Bradford and his wife on the ninth day of February, 1907.

After the conveyance of said property as above stated, Lillian Volquards died, leaving a last will and testament,

whereby she disposed of all her separate estate, among which was an undivided one-half interest in the real property in dispute. The defendant was named in said last will and testament as the executor thereof.

The plaintiff makes the claim that the real property involved in this issue was, at all times, his separate estate, having been entirely paid for by him from his separate funds, and that the claim of the defendant, as the executor of his deceased wife's testament and estate, to an interest in said property is wholly without legal justification.

By the terms of section 164 of the Civil Code, the presumption is that, by the conveyance of the land in dispute to the plaintiff and his wife, there being expressed in the instrument of conveyance no different intention, the wife took the part conveyed to her as tenant in common.

The plaintiff's was the only oral testimony offered before and received by the court. He declared, on direct examination, that the full purchase price of the property was the sum of three thousand seven hundred dollars, and that, at the time of the purchase, he made a cash payment of one thousand two hundred dollars, of which amount he already had six hundred dollars and the balance, six hundred dollars, he "borrowed from an interest in a ranch that I had before I was married," said ranch being situated in Tulare County. The balance of the purchase price, he stated, he borrowed from the Providential Building and Loan Association. Under his contract with said association, he was to liquidate the indebtedness thus incurred by making to said association monthly payments of thirty-three dollars, and these payments he made, so he testified, partly out of his own earnings as a carpenter and partly from moneys he received on the interest he had in the ranch above referred to. "At the time the deed was executed," he proceeded, "my wife was not there; Mr. Gunther was there. My wife never contributed any money toward the purchase price of this property. I never had any agreement with my wife that any part of the property should become her separate property. I never made a deed of gift to my wife as to any part of this property."

On cross-examination he stated that he finally discontinued his relations as to the lot in question with the loan association by paying the latter up in full. There was a balance

due said association from the plaintiff by reason of the transaction of about two thousand dollars. He said that, in order to settle with the loan association he borrowed one thousand dollars from the San Francisco Savings Union, a banking concern in the city of San Francisco. This sum, he admitted, "was borrowed on the joint note of myself and wife." He then paid the association up in full by adding to the one thousand dollars so obtained the sum of one thousand dollars which he received on the sale of two United States government bonds, each of the denomination of five hundred dollars, which bonds, he admitted, belonged to his wife, but of which, he declared, she had made him a gift, to dispose of them as he pleased. He admitted that his wife owned a lot in Burlingame, that she had some money in bank and four United States bonds, each of the denomination of five hundred dollars, of which number of bonds two were given to him, as above stated. He further admitted that his wife personally made most of the monthly payments of thirty-three dollars, hitherto mentioned, to the building and loan association, but insisted, as he declared on his direct examination, that those payments were invariably made out of his separate funds.

It is further made to appear that, on July 14, 1910, the plaintiff, in the names of himself and wife, brought an action in the superior court in and for the city and county of San Francisco, under and by virtue of an act of the legislature, popularly known as the "McEnerney Act," and entitled "An act to provide for the establishment and quieting of title to real estate in case of the loss or destruction of public records," approved June 16, 1906, the purpose of said action being to secure a decree establishing and quieting the title of the plaintiffs to the property in dispute, the record evidence of the title having been destroyed. The judgment-roll in said action was introduced in evidence in the present action, and therefrom it appears that the complaint in said action alleged "that the plaintiffs are the owners of the above described real property, and each and every part thereof, in fee simple absolute," and the court therein found, and entered its decree accordingly, "that said plaintiffs are the owners of and seized in fee simple absolute and in the actual and peace-

able possession of all of the real property described in said complaint."

Thus we have reproduced in substance all the evidence which was presented at the trial and upon which the trial court grounded its findings.

The question which we are called upon to decide, stated concretely, is whether the trial court, by the conclusion at which it arrived upon the legal effect or evidentiary value of the plaintiff's testimony, transcended the bounds of the discretion which, in the very nature of things, must be left to such court in the decision of questions of fact. A careful examination of the plaintiff's testimony, in its entirety, as it is presented by the record, justly forbids such a conclusion by this court.

It is true that the presumption established by section 164 of the Civil Code is not conclusive, but may be disputed and overthrown by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony (*People v. Milner*, 122 Cal. 179, [54 Pac. 833]; *Reclamation District No. 70 v. Sherman*, 11 Cal. App. 419, [105 Pac. 277]), and whether, in any case, a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question whose solution is solely with the trier of the facts, and, while, manifestly, a trial court or jury cannot arbitrarily accept a disputable presumption as against other testimony received in direct opposition thereto, yet, unless it is clearly and unmistakably made to appear that an arbitrary course in that regard has been followed by the trial court or jury, it does not rest within the legal power or right of an appellate court to say that the presumption should have been rejected as having been dispelled by the evidence set up against it.

The legal right of a trial court or jury to repudiate the testimony of any witness, where, in the consideration of such testimony, it is found to be unworthy of credence, will not, of course, be disputed. In this case, notwithstanding that the plaintiff, on his direct and redirect examination, asseverated that the property in question was purchased by him with his separate money and that he gave his wife no interest in said property, it will not be doubted that it was within the

legal competence of the trial court to disbelieve his statements favorable to his theory of the case or to hold that their verity was of such a questionable character as to preclude a just conclusion that, in probative force, they were sufficient to overcome the presumption that, during her lifetime, his deceased wife was the absolute owner of an undivided one-half interest in the property which is the subject of this litigation. The plaintiff gave his testimony in the presence of the trial court and thus the latter enjoyed the advantage, not given to courts of review, of observing the manner in which he testified and thus applying a test, in the consideration of his testimony, which is all-important in determining the amount, if any, of credit or weight to which it was justly entitled as in substantiation of his claim respecting the title to the property.

While this court cannot perform the impossible task of weighing the testimony of the plaintiff and thus determining its value in proof of the fact to which it was addressed, we may, nevertheless, call attention to some reasons appearing in his testimony which may well be held, consistently with the limited power and ability of a court of appeal to review questions of fact, to have, at least apparently, justified the trial court in reaching the conclusion that the presumption supporting the title of the defendant's testatrix to an undivided one-half interest in fee simple in the property in controversy was not thus destroyed.

It will be remembered that the plaintiff admitted that his wife delivered to him two United States government bonds, each of the denomination of five hundred dollars, that he sold said bonds for the total sum of one thousand one hundred and forty-five dollars and that of the amount so received he paid one thousand dollars on the indebtedness then still due on the purchase price of the lot. Although he claimed that those bonds were presented to him by his wife as a gift, to be used by him as he felt disposed to use them, still, in view of the fact that the property had been conveyed to the plaintiff and his wife without any evidence in the instrument of conveyance that the wife was not to take the part so conveyed to her as tenant in common, and in view of the further fact that the money received from the sale of the bonds was actually used in paying off the indebtedness on the property, it is not difficult to understand how the court could have

justly concluded that the deceased delivered said bonds to the plaintiff, not as a gift to him, but to be devoted to the specific purpose to which he in fact applied the major portion of the proceeds from the sale thereof, viz.: in part payment of the balance then remaining due on the indebtedness existing against the lot.

The fact of the bringing of the suit under the "McEnerney Act," in the names of himself and wife, to quiet title to the lot in dispute, basing their title on the deed whereby the property was conveyed to them in their joint names, is another circumstance which may well be regarded as a support to the court's conclusion as to the facts. Neither in his complaint in said action nor, presumptively, at the trial thereof, was there any evidence even of a pretense that it was not intended and understood that the wife was not to take under the conveyance as a tenant in common with the plaintiff. Even if it be true, as the plaintiff contends, that, since the real purpose of an action under said act, although partaking somewhat of the nature of a suit to quiet title, is to secure the restoration of destroyed record titles to real property, the decree in that case may not be said to have the effect of establishing the title of the wife to an undivided one-half interest in the property and, therefor, of operating as an estoppel as to such title, still it must be said, as stated, that it to some extent adds support to the presumption upon which the defendant relies.

Another circumstance to which the trial court justly could and no doubt did attach some significance in determining whether the presumption had been removed is the fact that the wife joined in the execution of the note and mortgage for the one thousand dollars secured from the Savings Union and with which the indebtedness on the lot of the loan association was partly extinguished, said transaction occurring at about the same time that the two United States bonds, also, as seen, used in paying off said indebtedness, were delivered to the plaintiff by his wife.

But we need proceed no further in an analysis of the evidence to show that the trial court was not without some apparently strong and substantial reasons for discrediting the testimony in chief of the plaintiff. As before declared, we are not in a position to conclude, under the circumstances of

the case as this court is required to view it, so far as the facts are concerned, that the trial court, in deciding the question as to the title to the property, was not justified in rejecting the testimony of the plaintiff and accepting in lieu thereof the presumption referred to.

We perceive nothing in the cases of *Bollinger v. Wright*, 143 Cal. 292, [76 Pac. 1108], and *Killian v. Killian*, 10 Cal. App. 312, 317, [101 Pac. 806], cited by the plaintiff, which is in conflict with the conclusion arrived at here. We shall not review those cases. It is enough to say that, upon reading those cases, it will be found that the circumstances disclosed therein are very much different from those shown in the case at bar.

The judgment and order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 293. Second Appellate District.—December 17, 1913.]

THE PEOPLE, Respondent, v. QUAN GIM GOW, Appellant.

CRIMINAL LAW—CONFESSION OBTAINED BY POLICE OFFICERS—WHEN NOT VOLUNTARY.—Where police officers procure a confession from a Chinaman by persistent questioning when he is apparently frightened and unwilling to answer after having been arrested for murder, there being present with him no interpreter or any person of his own nationality through whom he may clearly make known his disinclination to speak, or express understandingly any explanations which he may desire to give, the confession is involuntary, though no physical force is used and no threats or promises are made.

ID.—PARTICIPATION OF POLICE OFFICERS IN PROCURING CONFESSION AS SHOWING ITS INVOLUNTARY CHARACTER.—The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character.

ID.—ERROR IN ADMITTING CONFESSION IN EVIDENCE—WHEN PREJUDICIAL.—The admission of such confession in evidence in a prosecution for murder to prove that the defendant, who made it, fired the fatal shot, is reversible error where the case as presented to the jury, without the confession, is such as might leave the jury in doubt as to whether the defendant committed the crime.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

Davis & Rush, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

JAMES, J.—Appellant herein was convicted of the crime of murder in the second degree. He appeals from the judgment and from an order denying his motion for a new trial.

The deceased was one of the proprietors of a store located in that portion of the city of Los Angeles called Chinatown. On the twenty-fifth day of May, 1912, appellant entered this store. The room was divided into two compartments, the one nearest the street being utilized for the sale of merchandise, while a curtained room in the rear was used for gambling purposes. It was in this rear room that the shots were fired which killed Chin Hoy Hing. The witnesses who furnished the testimony as to what occurred in the two rooms were Chinese and none of them testified to having seen the defendant fire the fatal shot. One of these witnesses testified that he sat in the outer room as a lookout to warn the gamblers of the approach of officers; that he did not see the defendant go into the gambling room, but saw him come out after having heard some shots fired; that the defendant ran out into the street, fired a shot at the building and then threw his gun away, when he proceeded up the street until he met the officers who arrested him. Two other Chinese, who were partners of the deceased, testified that they were in the gambling room when the shots were fired, but that they did not see who fired them. These witnesses were introduced on behalf of the prosecution. Four witnesses of the same nationality as those who preceded them on the witness-stand testified on behalf of the defendant, and they told a story generally to the effect that after the shooting occurred two men came out of the store with pistols in their hands and ran away, and that the defendant came out after them.

The defendant's own testimony was to the effect that he entered the store intending to gamble, but had stopped at the counter in the outer room, when the shooting occurred in the gambling compartment and two men came hurrying from the rear room past him; that as they did so they jostled him and that he pulled his revolver and fired a shot which lodged in the wall above the counter; that he then ran out after the men and fired another shot as he got into the middle of the street, then threw his gun away and again ran. The surgeon who performed the post-mortem examination on the body of deceased testified that he found two bullets embedded in the body, both being of 38 caliber, one, however, being what is called "long" and the other "short." One of the police officers at the trial testified that all of the empty shells found in the revolver which the defendant threw away in the street were "38 long." This brief resumé of the evidence shows that the case as presented to the jury, leaving out of consideration the testimony as to an alleged confession made by the defendant, was one which might well have left the jury in doubt as to whether the defendant had actually fired the shots which killed the Chinese storekeeper.

Testimony of an alleged confession made by the defendant soon after his arrest was furnished by several police officers. One of these witnesses was the arresting officer, who testified that on the day of the arrest defendant was taken into the detectives' office at the police station in Los Angeles and, in the presence of several officers, interrogated as to the killing of Chin Hoy Hing. It is the earnest contention of counsel for appellant that the trial judge erred in admitting this testimony, for the reason that the statement of the defendant as represented to have been there made was not free and voluntary. In order to fully illustrate the conditions as they then surrounded the defendant, it will be well to quote from the narrative of the testimony of the arresting officer, as it appears in the transcript. The following quotations are not made in continuous sequence, but those interrogatories and the answers made thereto which refer to the matters in point are given:

"(Cross-examination.) Q. Now, when the defendant was first interrogated, he didn't want to answer, did he? A. He did not. Q. And he didn't—he hung his head and refused

to answer for some time? A. Didn't say anything for quite a while. Q. And it was only after persistent questioning that you finally obtained—succeeded in obtaining any answers at all? A. After we questioned him for possibly five or ten minutes. Q. When you got the defendant in there, did he have any other—was there any other Chinamen present? A. No, sir. Q. Any friend of his? A. No sir. Q. Any attorney? A. No sir. Q. No one at all to represent him? A. No sir. Q. And you officers that gathered about there and questioned him for some time before he would answer at all? A. Yes sir. Q. But eventually you got him started to answer? A. Yes. Q. When you got him started to talk, you kept him at it? A. Yes; generally kept it up. He went right ahead and talked. Q. All you knew was that he had refused to talk to you for some time A. He had. Q. Refused to say a word? A. He did. A. Officer Browning asked him why did you shoot this man, or why did you shoot at him. He asked that a number of times before he would answer; possibly five or ten minutes he kept asking him that question, and he also asked what tong he belonged to, where he came from, what tong the other man belonged to. That is nearly everything that was said at that time. Q. Now, I will ask you if it is not a fact that when these questions had been asked of him many times, you were satisfied that he didn't want to answer, but that you didn't give up hope? A. Well, we just thought eventually that he would talk; he kept fidgeting around in his chair, looked like he wanted to say something, but was afraid. Q. So, he refused to answer at first, and not to give up, you kept on asking him until he finally answered? A. Yes. Q. And the defendant appeared to be fidgeting and squirming around in his chair as though he was afraid to answer? A. I thought he wanted to do so, but he didn't know whether he better or not. Q. You don't know whether it was because he was afraid to answer or afraid not to answer, when he was squirming around in his chair, do you? A. I do not know. Q. Did he appear to be afraid? A. Outside of squirming in his chair, he didn't. Just calm and cool." The Officer Browning referred to by this witness testified that he did not instruct the defendant that he need not answer questions, or that the answers he might make would be used against him. The statement finally admitted

in evidence as having been given by the defendant was to the effect that when asked why he killed the Chinaman, he said that he had gone into the place of the deceased to gamble, that he had lost four dollars, and that the man who had been killed shot at him two times, and that he shot in return four or five times; that he had come to San Francisco a day or two previous to the day upon which the shooting occurred. Was the statement of the defendant shown to have been voluntarily made? If not, then no evidence of it was entitled to have been given to the jury. The defendant, a Chinaman, was brought, while under arrest, alone, and unaccompanied by friends or counsel, into the office of the detectives and there subjected to a vigorous oral examination. At first he refused to answer any questions and his silence continued, for from five to ten minutes. The questions were persisted in; the same interrogatory designed to draw from him the admission that he had fired the shot that killed Chin Hoy Hing, was repeated many times. At one point he said he did not "savey" or understand. He fidgeted and squirmed in his chair and appeared afraid of something. Finally he gave the statement set forth in the foregoing. It seems quite clear from the evidence of the conditions which surrounded the defendant at that time that he did not desire to make a statement. While no physical force was used and neither threats nor promises made, there can be no doubt at all but that the repeated questioning of the officers, like the constant dropping of water upon a rock, finally wore through his mental resolution to remain silent. Admittedly, his refusal at first to answer incriminating questions gave evidence of a desire to make no statement. When did this unwillingness vanish and a desire to talk succeed it? Not after he had been given any period of time for reflection, for his inquisitors allowed him none. The examination was persisted in until a response was forthcoming, and under these circumstances it must be said that the responses appear to have been unwillingly made and as a direct result of continued importuning. This case does not present an instance of as flagrant a disregard of an accused's constitutional right not to be compelled to furnish self-accusing evidence, as is illustrated by the cases of *People v. Loper*, 159 Cal. 6, [Ann. Cas. 1912B, 1193, 112 Pac. 720], and *People v. Borello*, 161 Cal. 367, [37 L. R. A.

(N. S.) 434, 119 Pac. 500], but what is said in those decisions touching the general subject here considered is pertinent and applicable. The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character. As is said in *Bram v. United States*, 168 U. S. 557, [42 L. Ed. 568, 18 Sup. Ct. Rep. 192]; "Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained it is conceded may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as approaching dangerously near to a violation of the rule protecting the accused from being compelled to testify against himself." As has been adverted to, in this case, there was not only the presence of more than one police officer, but each engaged in questioning the defendant, who was apparently frightened and who was not furnished the aid of an interpreter or any person of his own nationality through whom he might make clearly known his disinclination to speak, or express understandingly any explanations which he might have desired to give. The attorney-general argues that the statement of the defendant was not in fact a confession of guilt, and that therefore the prosecution was entitled to introduce evidence of it without any preliminary showing as to its voluntary character. The evidence was offered to prove an important incriminating fact, to wit; that the defendant had fired the fatal shot. The decision in *Bram v. United States*, 168 U. S. 557, [42 L. Ed. 568, 18 Sup. Ct. Rep. 192], cited and approved in the California cases above mentioned, contains this expression: "It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in its admissibility." In the case of *People v. Wilkins*, 158 Cal. 530, [111 Pac. 612], cited by respondent, the statements which were held not to amount to a confession contained no admission as to the principal

incriminating facts; there the defendant denied that he had been instrumental in the killing. The error of the court in admitting the confession, under the circumstances shown here, was highly prejudicial.

The instructions of the trial judge given to the jury were quite complete in their statement of the law as applicable to the charge upon which defendant was tried and to the evidence introduced under it. It was not error for the court to advise the jury that all persons concerned in the commission of a felony might be prosecuted as principals, and no new theory was thereby injected into the case. Under the evidence the jury had the right, if it so believed, to determine that the defendant committed the crime in conjunction with other persons. While it is shown that the court refused certain instructions offered by appellant, it appears also that the matters which they embraced were covered sufficiently in the charge as given.

Because of the error first considered, the judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 13, 1914.

[Crim. No. 299. Second Appellate District.—December 17, 1913.]

THE PEOPLE, Respondent, v. WILLIAM WILSON, Appellant.

CRIMINAL LAW—HOMICIDE—ADMISSIBILITY IN EVIDENCE OF PIECES OF BUGGY SHAFT.—In a prosecution for murder, where the evidence is purely circumstantial, pieces of a buggy shaft, found on the premises where the crime was committed, are admissible in evidence, there being evidence tending to show that the fatal blow received by the deceased was administered by the use of the shaft.

ID.—FOREMAN OF CORONER'S JURY AS WITNESS—CROSS-EXAMINATION—INTRODUCTION OF CORONER'S VERDICT.—In such prosecution it is proper, on the cross-examination of the prosecuting witness, who was

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foreman of the coroner's jury, to refuse to admit in evidence the verdict of such jury certifying that they did not know who killed the deceased.

ID.—EVIDENCE OF PRIOR ACTS OF VIOLENCE—REFUSAL TO STRIKE OUT—NONPREJUDICIAL ERROR.—When in such prosecution evidence is admitted of violence suffered by the deceased on a certain occasion, but the defendant is not shown to have been connected therewith, it is error to refuse to strike out such evidence; but the error is not to be regarded as prejudicial on appeal, when the record contains other evidence of actual violence on other occasions on the part of the defendant toward the deceased.

ID.—EVIDENCE—PREVIOUS HOSTILITY AND VIOLENCE—RE MOTENESS IN TIME.—Testimony in a homicide case that the defendant has at different times within a year or two before the death of the decedent quarreled with and expressed hostility toward the deceased is admissible as tending in some degree to show malice and motive with reference to the offense charged. The objection as to the remoteness of the occurrences goes to the weight rather than to the admissibility of the evidence.

ID.—THREATS AGAINST AND ASSAULTS UPON DECEASED—EVIDENCE—INSTRUCTIONS.—An instruction that "evidence has been introduced as to altercations with, threats against and assaults upon the deceased by the defendant. This evidence has been admitted for the sole purpose of showing the relations existing between the deceased and the defendant, and for the purpose of showing motive, if any; and may be considered by you as a circumstance in connection with the other facts and circumstances in the case in determining whether or not the defendant is guilty of the crime charged,"—is not objectionable, (although it might have been phrased more carefully), as telling the jury that those altercations, assaults, and threats actually occurred.

ID.—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION—ARGUMENTATIVE INSTRUCTIONS.—An instruction in a homicide case, where the evidence is purely circumstantial, that "counsel for defendant has referred to a number of cases wherein convictions have been sought and had upon strong circumstances of guilt proved against the accused in those cases, and afterward it has transpired that the accused was innocent, notwithstanding the strong circumstances shown against him. These cases are extreme cases, and probably do not occur but seldom in cases decided upon circumstantial evidence. Reference to such cases is proper in order to make the jury careful in arriving at the proper conclusion from such evidence; but the plain, practical rules of evidence which have been established for ages ought not to be shaken because of the reference to extreme cases by counsel wherein improper convictions have been had—and if much search be made, it would be

found that probably a greater number of cases might be cited wherein improper convictions have been had from direct and positive evidence through inattention or perjury of witnesses. All human testimony is fallible. But jurors in their decision must take and consider circumstances and if sufficient act upon them, although the main fact is proved by no eye-witness," is argumentative and should not be given.

Id.—**PROOF OF MOTIVE—INSTRUCTION SIMILAR TO ONE REQUESTED BY DEFENDANT.**—Where the defendant in a homicide case has requested an instruction that "it is not indispensable to a conviction of the defendant that a motive be shown for his commission of the crime," he cannot complain of an instruction given by the court that "in criminal cases the proof of the moving cause is permissible and oftentimes valuable, but is never essential." The defendant cannot complain of instructions which are in substance the same as those requested by him.

Id.—**EVIDENCE OF GOOD CHARACTER OF DEFENDANT—REFUSAL OF INSTRUCTIONS CONCERNING.**—Where the defendant in a homicide case has introduced in evidence the testimony of several witnesses who have been acquainted with him for many years, showing his good reputation "for peace and quietude and truth and veracity" in the communities where he has lived, and has requested the court to give the jury certain instructions pertinent to this evidence, the refusal of the court to give such instructions must, under the circumstances of this case, be regarded as prejudicial error resulting in a miscarriage of justice and calling for a reversal of the judgment of conviction.

Id.—**EFFECT OF PROOF OF GOOD CHARACTER—NECESSITY OF JURY GIVING IT CONSIDERATION.**—Proof of good character comes in aid of the general presumption of innocence, and is no more to be laid out of view by the jury in their deliberations than is the original presumption itself; it is itself a fact in the case.

Id.—**APPEAL—"MISCARRIAGE OF JUSTICE"—MEANING OF PHRASE.**—The phrase "miscarriage of justice," within the meaning of section 4½ of article VI of the constitution, does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.

APPEAL from a judgment of the Superior Court of Santa Barbara County and from an order refusing a new trial. S. E. Crow, Judge.

The facts are stated in the opinion of the court.

B. F. Thomas, and A. B. Bigler, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant having been convicted of the crime of manslaughter, appeals from the judgment and from an order denying his motion for a new trial.

The information in this case charged the defendant with the crime of murder committed on the twenty-second day of October, 1912, in the killing of one Thomas Wilson. The defendant and the deceased were brothers, aged respectively about fifty-four and sixty years. In October, 1912, and for about one year prior thereto, they had been living together on a ranch known as the Hopkins place, located nearly two miles southeast of the town of Orcutt in the county of Santa Barbara. During October, 1912, these two were the only occupants of the ranch and of the house thereon where they were living. In the afternoon of October twenty-first they went together to Orcutt, and after attending to some business there, they drove back to the ranch. On the morning of October 22nd, between eight and nine o'clock, the defendant came to Orcutt and gave information that his brother was dead, and asked the justice of the peace, who was also acting coroner, to come to the ranch. The defendant then returned to the ranch, being immediately followed by the acting coroner and several other men, most of whom were summoned as members of a coroner's jury. The evidence upon which the defendant has been convicted is entirely of a circumstantial nature, and consists largely of testimony of these men who visited the ranch on that morning as to the facts which they discovered on inspection of the premises at the Hopkins place.

There was a front porch of the Hopkins house, with a door opening into a middle front room, known as the sitting room, and in which there was a fireplace. On the right side of the

sitting room as one enters through the front door there was a door opening into defendant's bedroom. Immediately opposite this on the other side of the sitting room was a door opening into the bedroom of Thomas Wilson. These witnesses found Thomas Wilson lying on his back on the front porch, with a pillow under his head, his right arm extended by the side, and his left arm across the breast. The right arm was broken at the elbow and the third finger of the left hand was mashed as by some severe blow. Two cuts made by the blows of some blunt instrument had laid open the scalp on top of the head; and the evidence shows that one or both of these blows was the cause of death. There was a considerable amount of blood on the pillow and on the floor near the head and along the side where the arm lay. The testimony shows that blood was found in the sitting room on the casing of the door leading into the deceased's bedroom, and on the wall of the sitting room on each side of that door, and on the floor between the deceased's bedroom door and the front door and on the inner knob of the front door. Some effort had been made to wash the floor immediately in front of the deceased's bedroom door. From that place to the front door the blood was only in isolated drops, except that at one place in the sitting room and near the front door the blood marks approximated the shape that would be left by the pressure of a bloody hand.

Some of the witnesses found floating in the well near the barn a piece of an old buggy shaft. Some of the witnesses found behind a box on the front porch near the body of deceased a sliver of wood, which fitted into a recently broken place on the piece of buggy shaft found in the well. They also found in the ashes of the fire place a broken end of a buggy shaft, but this was not shown to fit into or be a part of the piece of buggy shaft found in the well. There is some evidence of human blood stains upon the sliver of wood found on the porch and upon the piece of buggy shaft found in the well. There is no evidence showing where these pieces of buggy shaft came from, nor that they were ever seen on the Hopkins place before the 22nd day of October, 1912, nor that any person ever saw them in the possession of the defendant. One witness also stated, with respect to the piece taken from

the fire place, "I think it had blood spots on it, or what was apparently blood spots."

Defendant testified that when he returned with the deceased to the Hopkins place on the evening of October 21st the defendant unhitched the team and the deceased went up to the house; that when the defendant came up to the house his brother was lying on his (the deceased's) bed; that at about seven o'clock the defendant went to bed and read a newspaper until nearly ten o'clock, at which time he heard his brother go out; that the defendant went to sleep without hearing his brother return to the house; and the defendant then slept until six o'clock in the morning; that at about six o'clock in the morning the defendant, after making some preparations for breakfast, looked into his brother's room and then looked out through the window and saw him lying on the porch; that he went out and found that his brother was dead, and thereupon he put the left arm up over the breast, went into the house and got a pillow which he brought out and placed under his brother's head; that he then went to his brother's bed and obtained a bedspread with which he covered the body, as it was found by the men who came later; that he then hitched up the team, drove to a neighbor's, where he reported his brother's death, and then went to Orcutt, where he reported the fact of his brother's death.

There is testimony by several witnesses relating to a number of occasions when quarrels are said to have occurred between defendant and Thomas Wilson. These occurrences are placed at various times extending from two weeks to two years prior to October 22, 1912. For the most part they are isolated instances supported separately by single witnesses and denied in whole or in part by the defendant.

There are many assignments of error set forth in the briefs of defendant's counsel. After eliminating those which are of slight importance or not justified by the record, the following items appear to require more particular discussion or statement of the opinion of this court.

The court did not err in admitting in evidence the pieces of buggy shaft. It was necessary for the prosecution to show as accurately as possible the means by which and manner in which Thomas Wilson came to his death. The facts with respect to those pieces of wood having been shown as herein-

above stated, their presence upon those premises at the places where they were found and under the circumstances then existing, had a direct tendency to show that the blows received by Thomas Wilson had been administered by the use of said buggy shaft. In *People v. Hill*, 123 Cal. 571, [56 Pac. 443], it was held to have been error for the court to permit to be received in evidence and exhibited to the jury a club found in the corral where the defendant and the deceased had the encounter in which the murder was alleged to have been committed. There was in that case no evidence tending to show that the stick was the one with which the deceased had been hit, or that the defendant was connected with it in any manner. The presence of blood marks or other signs connecting it with said encounter would have made the exhibit admissible in evidence. In *People v. Sampo*, 17 Cal. App. 149, [118 Pac. 957], referring to the admission in evidence of a rock found at the place where the defendant had administered a beating to the deceased, the court held that such evidence was properly admitted, not only because there was testimony that the defendant had used a rock in attacking the deceased, but also because this rock was admissible in evidence for the following reasons: "Moreover, the doctors testified that the wound inflicted upon Pistone's head appeared to have been produced by some blunt instrument, and that it could have been caused by the use of the rock in question. Having been found at the very place where the beating occurred, with fresh blood stains thereon, and in view of the testimony of the physicians that the wound could have been made by means thereof, the rock itself constituted a pertinent circumstance to be considered with the other evidence in determining the question of the guilt of the accused."

On cross-examination of the witness James H. Drumm, it having been made to appear that this witness had been foreman of the coroner's jury, and also that he was the complaining witness on whose sworn statement this prosecution was instituted, the defendant offered in evidence the verdict of the coroner's jury. Upon objection that this was irrelevant and immaterial, the court sustained the objection and refused to allow defendant's counsel to state the purpose of the offer. It is now stated that the object was to show that the witness had made contradictory statements in that on the twenty-

second day of October he joined in a verdict of the coroner's jury stating that they did not know by whose hands Thomas Wilson come to his death, and that on the following day, without further evidence, he filed the complaint charging the defendant with murder. Immediately preceding the offer in evidence of said verdict, defendant's counsel asked the witness: "What discovery of evidence of any sort in regard to defendant's guilt in this case did you make between the time you signed the verdict of the coroner's jury up to the time you filed the complaint?" This was objected to as irrelevant, immaterial, and not cross-examination and the objection was sustained. We find no error in these rulings. Assuming that the witness had joined in a verdict of the coroner's jury and thereby certified to the fact that he did not know who killed Thomas Wilson, that was not inconsistent with his right and duty as a witness to state in testimony any facts known to him and relative to the issues of this case, and was not in conflict with any testimony so given by him.

The witness C. R. Drumm had been employed by the defendant in December, 1911, and January, 1912, at the Hopkins place. After relating an incident in which he stated that the defendant struck Thomas Wilson in the face, this witness referred to another occasion during his said period of employment, as follows: "I had been in the dining room eating my supper and I got through with my supper and went into the sitting room and was sitting there in the sitting room. I heard a fall and immediately afterwards Billy came into the room and says, 'Tom fell down and I picked him up,' and the next morning, why, both of Tom's eyes were shut." The defendant moved to strike out this answer as not connecting the defendant with any blows or bruises upon Thomas Wilson's face, and the motion was denied. We think this ruling was erroneous. For the reason stated in the motion, the answer should have been stricken out. This, however, cannot be seriously prejudicial to the defendant, since the record contains other evidence of actual violence on the part of defendant toward said Thomas Wilson.

In October, 1911, for a short period of time, Thomas Wilson left the defendant and lived at the house of one F. J. Beson. Mr. Beson having testified to this fact was asked whether, during the time that Thomas Wilson was living at his place,

the witness had ever heard a conversation between Thomas Wilson and the defendant. Defendant's counsel objected to this evidence as too remote from the time of the alleged murder, and the objection was overruled. The witness then testified that the defendant asked Thomas Wilson if he was coming back to him and that Thomas replied: "It's no use; we cannot get along, and I am not coming back." Immediately following this testimony the witness, referring to a prior occasion when Thomas Wilson's eyes were black and his face scratched up, repeated a conversation in which the witness asked the defendant what was the matter with Tom's face and the defendant said: "I slapped him over and knocked him over the other day. It is no credit to a brother to hit another one, but he makes me so mad sometimes that I can't help it." The admission of this and some similar testimony is claimed to have been erroneous because of the remoteness of the incidents from the time of the alleged murder. We think, however, that where, as in this case, a series of incidents are shown, beginning a year or two prior to the date of the offense charged and recurring at intervals down to a time near said date, the objection on account of remoteness of the earlier incidents cannot be sustained. These incidents taken together (to the extent that they were proved by the evidence) constitute the best available evidence of the actually existing relations between the defendant and the deceased while they were so living together, and thus tend to show the existence of malice or a motive for further violence on the part of the defendant. In a case of this kind, testimony that the defendant has on previous occasions quarreled with and expressed hostility toward another is admissible as tending in some degree to show malice and motive with reference to the offense charged. The objection that the occurrence was too remote goes to the weight rather than to the admissibility of the evidence. (*People v. Piercy*, 16 Cal. App. 13, [116 Pac. 322]; *People v. Chaves*, 122 Cal. 134, 143, [54 Pac. 596].)

The seventh instruction given the court is as follows: "Evidence has been introduced as to altercations with, threats against and assaults upon the deceased by the defendant. This evidence has been admitted for the sole purpose of showing the relations existing between the deceased and the defend-

ant, and for the purpose of showing motive, if any; and may be considered by you as a circumstance in connection with the other facts and circumstances in the case in determining whether or not the defendant is guilty of the crime charged." It is objected to the foregoing instruction that it practically tells the jury that those altercations, assaults, and threats actually occurred. Undoubtedly it is the policy of our law, emphatically stated in the constitution of the state, that judges shall not charge juries with respect to matters of fact; but it is also declared that they may state the testimony and declare the law. (Const., art. VI, sec. 19.) While the foregoing instruction might have been phrased more carefully, so as to make it clearer that the court was not instructing upon the weight or effect of evidence, yet we cannot say that the instruction as given constitutes a declaration by the court with respect to matters of fact, or that it interferes with the full right and power of the jury to find the facts involved in the matters to which said evidence refers.

It is further objected that in giving instruction 17 the court violated said provision of the constitution by charging the jury with respect to matters of fact. Instruction 17 reads as follows: "Counsel for defendant has referred to a number of cases wherein convictions have been sought and had upon strong circumstances of guilt proved against the accused in those cases, and afterward it has transpired that the accused was innocent, notwithstanding the strong circumstances shown against him. These cases are extreme cases, and probably do not occur but seldom in cases decided upon circumstantial evidence. Reference to such cases is proper in order to make the jury careful in arriving at the proper conclusion from such evidence; but the plain, practical rules of evidence which have been established for ages ought not to be shaken because of the reference to extreme cases by counsel wherein improper convictions have been had—and if much search be made, it would be found that probably a greater number of cases might be cited wherein improper convictions have been had from direct and positive evidence through inattention or perjury of witnesses. All human testimony is fallible. But jurors in their decision must take and consider circumstances and if sufficient act upon them, although the main fact is proved by no eye-witness."

It is true that this instruction involves a statement of matters of fact, but, whether correctly stated or not, it related to matters of history and general information, rather than to facts contained in the trial record of this case. For this reason it may be that the instruction does not violate the above-mentioned provision of the constitution, but it is argumentative and, in our opinion, should have been omitted from the instructions given. It did not add anything to the law of the case as stated by the court in its other instructions.

Defendant claims that it was error for the court to state in its 18th instruction that, "in criminal cases the proof of the moving cause is permissible and oftentimes valuable, but is never essential." In No. 21 of the instructions requested by defendant we find a declaration that "it is not indispensable to a conviction of the defendant that a motive be shown for his commission of the crime." The defendant thus having offered this proposition as a part of the instructions requested by him, he is not in a position to claim the benefit of an objection thereto. "The defendant cannot complain of an instruction which is in substance the same as those requested by him." (*People v. Harlan*, 133 Cal. 16, 23, [65 Pac. 9].)

The instructions stating the law as to what constitutes manslaughter were properly given. (*People v. Cramley*, ante, p. 340, [128 Pac. 123].)

The defendant introduced in evidence the testimony of several witnesses who had been acquainted with him for many years, showing the defendant's good reputation "for peace and quietude and truth and veracity" in the communities where he has lived. The defendant having requested the court to give the jury certain instructions pertinent to this evidence, the court refused to give any of them and failed to give to the jury any instructions whatever on the subject of good character of the accused. The court should have given these instructions, or so much of them as was necessary to state the law with reference to the evidence of good character and the extent to which such evidence, and the facts shown thereby, may be considered as bearing on the question of the guilt or innocence of the defendant. Proof of good character, when shown by the evidence, comes in aid of the general presumption of innocence, and is no more to be laid out of

view by the jury in their deliberations than is the original presumption itself. The good character of the prisoner, when proven, is itself a fact in the case. It is a circumstance tending in a greater or less degree to establish his innocence, and cannot be put aside by the jury in order to ascertain if the other facts and circumstances considered by themselves do not establish his guilt beyond a reasonable doubt. (*People v. Raina*, 45 Cal. 292.) This ruling has been affirmed and further discussed in *People v. Shepardson*, 49 Cal. 629, and *People v. French*, 137 Cal. 218, [69 Pac. 1063].)

Having determined that the defendant was entitled to have instructions given with reference to the evidence of his previous good character, and the court having refused to give any such instructions, we are of the opinion that this failure constitutes error of such importance to the defendant's rights that we must carefully consider whether it has caused a miscarriage of justice within the meaning of section 41½ of article VI of the constitution of the state. Under such circumstances we are required to examine the entire cause, including the evidence, and thereby to determine whether the error complained of has "resulted in a miscarriage of justice." The phrase, "miscarriage of justice," does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. "It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected." (Opinion written by Mr. Justice Sloss in *People v. O'Bryan*, 165 Cal. 55, [130 Pac. 1042].) In the case last cited the same writer said: "We are not to determine, as an original inquiry, the question of the defendant's guilt or innocence. But, where the jury has found him guilty, we must, upon a review of the entire record, decide whether, in our judgment, any error committed has led to the verdict which

was reached. If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered."

The concrete question now presented in the present case is, was the conviction of this defendant just, and would that result have been reached if the court had given the defendant the benefit of appropriate instructions concerning the evidence of defendant's good character and concerning the duty of the jury to consider the same? A summary of the principal facts shown by the evidence is given at the commencement of this opinion. We have carefully examined the testimony as set forth in the reporter's transcript. We must take into view the fact that the evidence of defendant's guilt is wholly of a circumstantial nature, and that it was possible for some third person to have killed Thomas Wilson while the defendant slept. We must remember that there were some circumstances in the conduct of the defendant which might reasonably be construed as that of an innocent man; such as, for instance, that he promptly reported the fact of his brother's death, freely (we cannot say whether truly or not), answered all questions put to him concerning his brother's death; and made no effort to escape. And the record here shows that in two trials of this case the juries could not agree upon a verdict. Why did the third jury find the defendant guilty? Was the evidence of the state more convincing? Or were these last jurors more intelligent or more faithful to their duty? These questions we cannot answer since we have here the record of only the last trial. On the other hand, there are facts which limit the importance of the refused instructions with reference to the evidence of defendant's good character as a peaceable man. Of what avail is it that one's general conduct is peaceable and friendly, if he harbors malice against some one person? Here several of the witnesses recounted instances when, according to their testimony, the defendant raised his hand against his brother, and the circumstances shown in evidence indicate not only that Thomas Wilson was killed at the house on the Hopkins place, but also that some important part of the violent encounter took place in the sitting room next to the room where the defendant claims to have been asleep.

It is not for us to say whether we think that the defendant is guilty, and nothing said here is to be taken as indicating any opinion on the question of his actual guilt. We do hold that if the jury had been instructed upon the law concerning their duty to consider the evidence of defendant's previous good character as a part of the evidence upon which they were to determine the question of his guilt or innocence, such instruction would have added a substantial item to the balance in defendant's favor and might have changed the verdict. This being so, the case is one where the right of defendant to such instruction was a right the loss of which materially affected his general right to a fair and lawful trial.

The judgment and the order denying a new trial are reversed.

James, J., and Shaw, J., concurred.

[Civ. No. 1438. Second Appellate District.—December 17, 1913.]

DANIEL NEUHART, Respondent, v. GEORGE K. PORTER
COMPANY (a Corporation), Appellant.

CORPORATION—AUTHORITY OF MANAGER—EMPLOYMENT OF BROKER.—A general manager of a corporation has express authority to do those things only which are ordinarily customary and usual in the transaction of its business. He may have also ostensible authority to do other things which the corporation by a course of conduct may hold him out as being possessed of; but that condition is not shown in this case where a broker, in his suit against a corporation for a commission alleged to have been earned in procuring a purchaser of its stock and bonds, contends that the manager employed him for that purpose.

ID.—BROKER—PROCUREMENT OF OFFER—ACCEPTANCE BY PRINCIPAL.—In this action by a broker against a corporation for a commission alleged to have been earned in procuring a purchaser for its stock and bonds, it is held that, conceding the manager of the corporation had authority to bind it in the matter of the sale of the stock and bonds, it did not, through such officer, accept the proposal made to it through the broker, the broker admitting that he was not employed to obtain a purchaser at a price fixed but at such a price as would be satisfactory to his employer, and it not appear-

ing that the broker ever obtained a binding contract from his proposed purchaser.

Id.—SALE OF BONDS—AFFIDAVIT AS SHOWING ACCEPTANCE.—A mere recital in an affidavit, filed by the president of a corporation in an action to enjoin the sale of the stock and bonds in question, that an offer of two hundred thousand dollars had been obtained for them which it was desirable to accept, does not bind the corporation as an acceptance of the offer of the broker's client.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial.
Z. B. West, Judge presiding.

The facts are stated in the opinion of the court.

Louis P. Boardman, and Ward Chapman, for Appellant.

Carter, Kirby & Henderson, for Respondent.

JAMES, J.—Plaintiff alleged in his complaint that on or about the twenty-fifth day of November, 1909, he was employed by the defendant to obtain a purchaser for certain corporate bonds and stock and to negotiate a sale thereof subject to defendant's approval, for which it was agreed he was to receive a commission of one per cent on the amount of the sale. He alleged further that he did obtain a purchaser who was ready, able, and willing to pay the sum of two hundred thousand dollars for said stock and bonds and that the defendant agreed to accept the offer and to consummate the sale, but that it subsequently refused so to do, and sold the property to persons other than the proposed purchasers alleged to have been secured by plaintiff. Defendant admitted by its answer that one of its officers had agreed with the plaintiff that if a sale of the stock and bonds was made to a buyer found by plaintiff for a price satisfactory to defendant, a commission of one per cent would be paid, and admitted that the plaintiff had informed said officer that he had a purchaser who was able, ready, and willing to pay the sum of two hundred thousand dollars for the stock and bonds. It was denied that this offer was ever accepted, and it was denied that plaintiff did procure a proposed purchaser who was ready, able, and willing to pay the price mentioned. The

answer contained other matter of defense not necessary to be here stated. Upon trial being had, judgment was rendered in favor of plaintiff and a motion for a new trial was thereafter denied. Defendant has appealed from the judgment and from the order denying its motion for a new trial.

A determination of this appeal rests largely upon the solution of two questions, to wit: 1. Whether the general manager of defendant corporation had authority to bind the corporation in the matter of the sale of the stock and bonds in question; 2. Whether conceding that such authority existed, the corporation did through such officer accept the proposal made to it through plaintiff for the sale of the stock and bonds at the price of two hundred thousand dollars. It appears reasonably clear from all the evidence that the defendant was a corporation organized for the purpose of more conveniently handling the property of the George K. Porter estate, which consisted largely of agricultural lands. This corporation was organized by George K. Porter during his lifetime, and the capital stock of the same was apportioned in equal shares among his wife and two children. After his death his widow married Fred L. Boruff, who at the time of the transaction had with plaintiff was the secretary and general manager of the defendant corporation. The defendant, in addition to its direct ownership in lands, possessed one hundred and seventy-seven bonds of the San Fernando Mission Land Company and also one thousand shares of stock of the latter corporation. On the twenty-sixth day of August, 1909, at a meeting of the board of directors, a resolution was adopted which provided in part as follows: "Resolved, that Fred L. Boruff, the manager of the company, is hereby authorized and directed to put all the alleged properties of this company, with the exception of the home place, and improvements thereon, together with the orchards and premises surrounding the same, comprising about one hundred acres of land, upon the market for sale upon the most advantageous terms possible; and he is for that purpose authorized to employ agents to enter into negotiations with any prospective buyers and obtain such propositions as he can, both for the sale of said ranch property and also for the stock and bonds of the San Fernando Mission Land Company, and submit such offers or propositions to the board of directors; and if a satisfactory

proposition for the sale of any of said property is obtained, the president and secretary are authorized to consummate the same and to execute the papers necessary therefor." It was pursuant to this authority that Mr. Boruff, the general manager, negotiated with plaintiff for the purpose of selling the stock and bonds.

Plaintiff in his testimony stated that the price first set by Mr. Boruff was the sum of two hundred and fifty thousand dollars for the stock and bonds, and that upon he (plaintiff) remarking that he could not get that price, "Mr. Boruff thought he would take \$230,000, and I told him that was impossible, that we could not get that price for the property. Then Mr. Boruff and I had several interviews, I can't just tell how many; . . . Finally Mr. Boruff spoke about he would take \$215,000. . . . He said if I would sell them for \$215,000 he would increase my commission. I told him no, that that was not the question that came in; the question was for him to put a price that I could deliver the bonds. He then finally spoke of \$210,000. I then went back to Mr. Brand and told him that I had an offer, that I could deliver the goods for \$210,000, and I believe he then made the offer of \$200,000 for the property, both the stock and the bonds. Then I went to Mr. Boruff and told him, and finally Mr. Boruff agreed to take \$205,000, and if I got that through he would still increase my commission; I told him no, the regular commission was one per cent. . . . I went to Mr. Brand again, and he refused to give them any more. . . . I then went down to Mr. Boruff. . . . We discussed it pro and con, and finally he says, 'come on, let us go down to the bank and see how much we owe on it'; down to the Security Savings Bank." The stock and bonds had previously, and during the lifetime of George K. Porter, been pledged as collateral security for a large loan with the bank named. The plaintiff testified that after he and Boruff reached the bank the interest due on the loan was calculated, and that Mr. Boruff asked the president of the bank to deliver the stock and bonds to a certain trust company and which the president refused to do until he had consulted his attorney, for the reason that he understood that there was an interest of a minor in the stock and bonds about which some question had been suggested. Plaintiff narrated how talk had followed between himself, Mr. Boruff's attorney, the

attorney for the bank, and the attorney for the minor. The result was that in the course of two or three days an action was brought on behalf of the minor and the other child of George K. Porter, who was then of age, in which action an injunction was secured which restrained the corporation from making any sale of the stock and bonds. Within about thirty days the injunctive order was modified and a sale of the stock and bonds was made for a sum which netted the corporation two hundred thousand dollars, the purchasers not being the ones with whom plaintiff had had his negotiations. Plaintiff made no claim that Mr. Boruff had in words agreed to accept less than two hundred and five thousand dollars for the stock and bonds, and he also admitted that he had refused to inform Boruff as to who his prospective purchaser was. His counsel argue that the action of Boruff when the offer of two hundred thousand dollars was communicated to him by plaintiff amounted to an acceptance of the offer.

First taking up the question of the authority of the general manager to bind the corporation: Plaintiff made no statement in his testimony that any representations were made by Boruff as to the powers which he possessed respecting the business of the corporation; he did not even state that he knew that Boruff was the general manager of the defendant company. Throughout his testimony he referred to him simply as "Mr. Boruff." He made no claim of knowledge of any transactions had prior to that time wherein similar negotiations had been consummated by the general manager without protest from the corporation, and he made no showing that the general business of the corporation comprehended the sale or transfer of stock and bonds possessed by it. In fact, it may be said, judging by the contents of the affidavit filed by the president of the corporation in the injunction suit matter, that the chief and ordinary business of the corporation was to control, manage, and operate its agricultural lands. It seems that the debtors of the corporation to whom large sums were owing had pressed for payment, and the corporation had found it necessary to dispose of its principal properties in order to satisfy these creditors. There was owing to the bank which held the stock and bonds as collateral security a sum of money in excess of one hundred thousand dollars. In the resolution from which quotation has been made, and in the

preliminary portion thereof there was set forth the reasons why a sale of the property was desired to be made. A general manager of a corporation has express authority to do those things only which are ordinarily customary and usual in the transaction of its business. He may have also ostensible authority to do other things which the corporation by a course of conduct may hold him out as being possessed of, but that condition is not shown in this case, as has been before noted. (Civ. Code, secs. 2317, 2319; Thompson on Corporations, 2d ed., vol. 2, sec. 1690, et seq.) It has been held in this state that the president of a corporation has no power merely by virtue of his office to buy and sell the property of the corporation. (*Black v. Harrison Home Co.*, 155 Cal. 121, [99 Pac. 494]; *Alta Silver Min. Co. v. Alta Placer Min. Co.*, 78 Cal. 629, [21 Pac. 373]; *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, [89 Pac. 981].)

In considering whether there had been an acceptance by Boruff of the offer made by plaintiff, there is another fact which is entitled to emphasis, and that is, that the plaintiff at no time procured an offer of the price which Boruff stated to him he desired should be secured for the stock and bonds. In the complaint of plaintiff it was admitted that he was not employed to obtain a purchaser at a price fixed, but such a price as would be satisfactory to his employer. In his testimony he admitted that he never did obtain an offer for a price of any amount such as was named by Boruff, as the least price named by the latter was the sum of two hundred and five thousand dollars. Boruff's response to the offer of two hundred thousand dollars was: "Let us go to the bank and see how much we owe." Plaintiff never did produce his purchaser before Boruff, nor did he procure any deposit of money on account of the purchase price, and he refused to tell his employer who the proposed purchaser was. He never obtained a binding contract from his proposed purchaser, and therefore could not present to his employer an offer of contract which upon acceptance would have been binding upon the vendee. Under these circumstances the evidence did not justify the trial judge in determining that there had been an acceptance, even by Boruff of the offer alleged to have been procured by the plaintiff. The claim is made that, because in the affidavit of Kate C. Boruff, the president of the corporation,

which affidavit was filed in the injunction suit, the affiant set out that an offer for the stock and bonds of two hundred thousand dollars had been obtained which it was desirable to accept, such admission showed an acceptance by the corporation of the offer of plaintiff's client, and amounted to a waiver of any duty resting upon plaintiff to produce a binding offer from his proposed purchaser, or to produce him before the other contracting parties. The statements made by Kate C. Boruff in her affidavit, if they could be given the effect which respondent claims for them, could not be binding upon the corporation. She did not set out in her affidavit that the directors had accepted the offer, or that they had moved in that direction and would have consummated such act, except for the interference made by the injunctive order. On all of these points it seems that the plaintiff failed to sustain his burden by the proof offered, and that the findings of the trial judge in his favor are without sufficient support in the evidence.

For the reasons given, the judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 13, 1914.

[Civ. No. 1433. Second Appellate District.—December 17, 1913.]

JAMES A. BERNARD et al., Appellants, v. A. WEABER,
as City Treasurer of the City of Bakersfield, Respondent.

APPEAL—MOOT QUESTION—IMPROVEMENT BONDS—REFUSAL TO ENJOIN ISSUANCE.—An appeal from an order dissolving an injunction against the issuance of improvement bonds on the ground of their invalidity will be dismissed, where pending the appeal the bonds are issued, since a decision would have no binding authority and would not affect the legal rights of the parties.

ID.—PRESUMPTION OF ISSUANCE OF BONDS—PENDENCY OF APPEAL.—In such case where the complaint alleges that the city treasurer will, unless restrained, immediately issue the bonds, the appellate court

will accept this allegation as true and assume that he has performed the duty imposed upon him by law, and that therefore the bonds were issued upon the dissolution of the injunction and during the pendency of the appeal.

ID.—DECISION ON MERITS—JUDGMENT FOR COSTS.—In such case the appellants cannot insist upon a decision upon the merits by reason of the fact that a judgment for costs was rendered against them, where it appears from the record that no judgment for costs in any sum was rendered, it being recited therein that defendant recover costs of suit amounting to the sum of dollars.

APPEALS from a judgment of dismissal of the Superior Court of Kern County and from orders refusing to issue a preliminary injunction and dissolving a restraining order. J. W. Mahon, Judge.

The facts are stated in the opinion of the court.

Matthew S. Platz, and C. E. Arnold, for Appellants.

Rollin Laird, J. W. Wiley, and S. M. Haskins, for Respondent.

SHAW, J.—Action to enjoin the issuance of street improvement bonds. As shown by the complaint, filed June 7, 1912, the board of trustees of the city of Bakersfield did, on July 10, 1911, adopt a resolution of intention to order the improvement of certain streets in said city according to plans and specifications prepared therefor, and wherein it declared the expense of the improvements should be chargeable upon the lots and lands within a district designated as "Street District No. 1," the exterior boundaries of which were described therein. It was also declared in said resolution that the board of trustees found upon estimates furnished by the city engineer that the cost of the proposed work would exceed fifty cents per front foot along each line of the streets to be improved, and pursuant to the provisions of the Street Improvement Act determined and declared that serial bonds should be issued to represent all assessments made for the cost of said work where the same amounted to the sum of twenty-five dollars or more, which said serial bonds it was declared "shall extend over a period not to exceed five years from their date." The work of improving the streets was

fully performed by the contractor to whom award of contract therefor was made, and the work duly accepted by the superintendent of streets, who thereafter duly made and recorded the assessment and diagram, as required by law; and on the eighth day of May the superintendent of streets issued and delivered to the contractor a warrant whereby he was authorized to demand and receive the several assessments so made for the cost of the work, and wherein it was stated that "serial bonds bearing interest at the rate of eight per cent per annum, and extending over a period of four years from and after the 2d of January, next succeeding the date of said bonds, are to be issued to represent the cost and expense of the work described in the assessment, and in the manner and form prescribed by law, and notice is hereby given that a bond in such series will issue to represent each assessment of twenty-five dollars or more remaining unpaid for thirty days after the date of this warrant, or five days after the decision of the board of trustees of this city upon appeal." Plaintiffs are the owners of the lots and parcels of land described in the complaint, all of which are situated within the exterior boundaries of the improvement district so established, and the assessment against each of said lots and parcels of land amounts to over twenty-five dollars, none of which, it was alleged, had been or would be paid. It was further alleged in the complaint that the superintendent of streets was about to certify to the city treasurer of said city the failure of plaintiffs to pay said assessments within thirty days from the date of said warrant, to wit: May 8, 1912; and that the defendant as "city treasurer threatens and is about to and will, unless restrained by the order of this court, immediately issue to the said contractor, his agents or assigns, a separate bond upon each parcel or lot of land contained in said list, for the amount of said assessment upon each of said lots or parcels of land"; and that said bonds, if issued, will constitute a cloud upon plaintiffs' title. The prayer is for an injunction restraining the issuance of the bonds.

Upon the filing of the complaint, on June 7, 1912, the court issued a temporary restraining order and cited defendant to appear and show cause why a preliminary injunction should not be granted as prayed for. In response to this

citation, defendant at the hearing interposed a demurrer, which was by the court sustained and an order made dissolving the temporary restraining order theretofore issued, and the application for a preliminary injunction denied. Judgment of dismissal followed, from which, and the orders refusing to issue a preliminary injunction and dissolving the restraining order, plaintiffs appeal.

Appellants base their claim for reversal upon the fact that the board of trustees failed to fix a time for the maturity of the bonds proposed to be issued for the cost of the work, other than to declare in said resolution of intention and throughout the proceedings that they should "extend over a period not to exceed five years from their date," but, instead of so doing, delegated to the superintendent of streets the power to fix such time over which the bonds should extend, and that he, the superintendent, in the exercise of his discretion, fixed such time as about four and one-half years from their date. Otherwise the legality of the proceedings is conceded.

Respondent has filed no brief going to the merits of the controversy, but asks that the appeal be dismissed for the reason that the performance of the act which was sought to be enjoined,—namely: the issuance and delivery of the bonds, has been performed; hence a judgment of reversal rendered by this court could afford plaintiffs no relief. If, in fact, the city treasurer has heretofore issued and delivered the bonds, an order by this court in effect re-establishing the restraining order and issuing a writ of injunction restraining him from doing that which he has already done, would be an idle and frivolous act, since such decision would have no binding authority and would not affect the legal rights of the parties. (*Matter of Manning*, 139 N. Y. 446, [34 N. E. 931]; *Foster v. Smith*, 115 Cal. 611, [47 Pac. 591]; *Wright v. Board of Public Works*, 163 Cal. 328, [125 Pac. 353]; *Ball v. Kehl*, 87 Cal. 505, [25 Pac. 679]; *Bradley v. Voorsanger*, 143 Cal. 214, [76 Pac. 1031].)

As shown by the complaint, the warrant was issued and delivered on the eighth day of May, and recited that bonds representing each assessment of twenty-five dollars or more unpaid for thirty days after the date thereof would issue. The complaint, filed on June 7, 1912 (the day on which the thirty days after the issuance of the warrant expired), al-

leged that the superintendent of streets was about to certify to the city treasurer a list of unpaid assessments, each of which amounted to more than twenty-five dollars, and alleged that the city treasurer *would*, unless restrained, immediately issue said bonds to the contractor or his agent. We must accept this allegation as true. The restraining order was dissolved on June 28, 1912, since which time the defendant has been free to issue the bonds which it was alleged he *would* issue unless restrained. We must, therefore, assume that, as stated in the complaint, the city treasurer, upon dissolution of the restraining order, and in obedience to the duty imposed upon him by section 4 of the Street Improvement Act (Stats. 1911, p. 1202), whereby, upon receiving from the superintendent of streets a list of all assessments unpaid which amounted to twenty-five dollars or more, he was required to *thereupon* make out, sign, and issue to the contractor, or his assigns, a separate bond representing the assessment against each lot upon which the assessment remained unpaid, did so issue the said bonds; and this regardless of his opinion as to the legality of the proceedings. It is presumed that public officers perform their duty, and it was the duty of the city treasurer to deliver the bonds. Appellants insist that the court has no right to assume a change in the conditions existing on June 7, 1912, and since the record shows the bonds were not issued at the time of filing the complaint, we must, upon the theory that a condition once shown to exist continues, assume that they have not been issued. We cannot indulge in such presumption against the allegations of the complaint, for it was therein alleged that the treasurer would issue the bonds unless restrained; and it is further shown by the record that he was not so restrained. Moreover, as stated, we must presume that as a public officer the treasurer performed the duty imposed upon him, under the provisions of section 4 of the Street Improvement Act (Stats. 1911, p. 1202), of issuing the bonds, upon the superintendent of streets certifying to him a complete list of unpaid assessments, which certification, it is alleged in the complaint, the superintendent of streets was about to make, as required by law so to do.

Appellants further insist that they are entitled to a decision upon the merits by reason of the fact that a judgment for

costs was rendered against them. It appears, however, from the record that no judgment for costs in any sum was rendered, it being recited therein that defendant recover costs of suit amounting to the sum of dollars. (*Bradley v. Voorsanger*, 143 Cal: 214, [76 Pac. 1031].)

The demands upon the time of the court in deciding questions affecting actual rights of litigants are too pressing to permit of its discussing moot questions, however interesting they may be from an academic point of view.

The appeals from the judgment and orders are dismissed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1376. Second Appellate District.—December 19, 1913.]

JOHN F. CONNELL, Respondent, v. FORREST J. HARRIS.
et al., Appellants.

NEGLIGENCE—COLLISION OF AUTOMOBILE WITH REAR END OF WAGON—ABSENCE OF LIGHT AS REQUIRED BY ORDINANCE—ADMISSION BY PLEADING.—In an action by the owner of an automobile for damages caused to it by its collision with the rear end of a wagon loaded with heavy timbers, the failure of the defendant to deny the existence of the ordinance alleged by the complaint to exist and to require the drivers of vehicles in the night-time to display a white light in front and a red light in the rear, admits the existence of the ordinance and renders proof thereof unnecessary.

Id.—DRIVER OF WAGON—WHEN NOT AN INDEPENDENT CONTRACTOR.—The fact that the owner of the wagon had, at the time of the collision, left the vehicle and turned its possession over to a third person who had contracted to haul the timbers, does not make the latter an independent contractor and relieve the owner from liability on account of the accident, where the owner took part in placing the timbers on the wagon, rode some distance thereon, and assisted in placing the white light on the front of the wagon.

Id.—INDEPENDENT CONTRACTOR—NEGLIGENT USE OF PROPERTY—LIABILITY OF OWNER.—The owner of property is not responsible for negligence in the use of that property by an independent contractor to whose possession it has been surrendered for some lawful purpose.

ID.—WHAT CONSTITUTES INDEPENDENT CONTRACTOR—RETENTION OF CONTROL BY EMPLOYER.—In order to constitute such third person an independent contractor, it is necessary that he shall have control of the manner in which the contract work shall be done and be responsible only for the results of the work. If the employer retains the right to direct the manner in which the work shall be done, the employed person becomes his servant and the employer remains responsible for negligence of the servant.

ID.—VIOLATION OF ORDINANCE—NEGLIGENCE PER SE.—The violator of a local ordinance is guilty of negligence per se, if such violation contributes proximately to an accident.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Edgar T. Zook, Judge presiding.

The facts are stated in the opinion of the court.

Kendrick & Ardis, for Appellants.

R. L. Horton, for Respondent.

CONREY, P. J.—The defendants appeal from the judgment and from an order denying their motion for a new trial.

The plaintiff brought this action to recover damages for injuries caused to his automobile in a collision with the rear end of a wagon belonging to defendants. The collision occurred at night on the Washington Street Boulevard in the county of Los Angeles while both vehicles were going westerly from Los Angeles and toward Santa Monica. The wagon of the defendants, loaded with heavy timbers, carried no light, except a white light attached to said timbers. According to the allegations of the complaint, which are not denied in the answer of the defendants, an ordinance of the county of Los Angeles in force at the time of the accident provided that it was unlawful for any person to drive any vehicle upon any highway or public place during the period from one hour after sunset to one hour before sunrise, without having attached to the left side of such vehicle "a lamp showing a white light visible in the direction toward which said vehicle is proceeding and a red light visible in the reverse direction, or unless there is attached to the front of such vehicle a lamp showing a white light visible in the direction toward which

said vehicle is proceeding and also a lamp attached to the rear of said vehicle showing a red light visible in the reverse direction."

It is alleged in the complaint that the defendants at said time did not have "any light of any kind or character upon the rear part or portion of said wagon as required by a certain ordinance of the county of Los Angeles hereinafter referred to, by reason of which negligence on the part of said defendant" the injuries described were caused. The evidence shows that the plaintiff's driver was misled by the white light on the rear of the wagon of the defendants, as well as by the absence of any red light. According to the ordinance, a white light indicated an approaching vehicle, whereas a red light would have truly indicated that the vehicle was moving westerly. This was especially important not only as showing the direction in which the wagon was moving, but also as indicating which side of the road it was entitled to use.

The wagon was the property of defendants, but they denied that at the time of the collision it was in their possession or under their control. They had bought these timbers in Los Angeles. Then they had approached one Olivares, a teamster, and agreed with him that he should haul the timbers to Santa Monica for six dollars. As the wagon of Olivares was too small to properly carry the timbers, a larger wagon of the defendants was used, together with the horses of Olivares. The defendant Albert Harris went with Olivares and showed him the way to the yards where the timbers were and helped to load them and then rode with Olivares for some distance out Washington Street. Olivares testified as follows: "Harris rode a ways, then took the car and went home. When he left he told me to take the timbers home, and I took them there because he told me so." Harris and Olivares acted together in procuring the white-light lantern and fastening it to the timbers.

Counsel for defendants, after first arguing that there is not in the complaint any sufficient allegation of negligence, next contend that if the alleged failure to have such lights as were required by the ordinance did constitute negligence, the proof failed because the plaintiff did not introduce any evidence of the existence of the ordinance. To this the plaintiff's counsel responds that the pleading of the ordinance

was a material part of his cause of action, and that in the absence of an issue raised by denial it was not necessary to offer evidence to prove the ordinance. It is a fact that the answer on file contains no denial of the existence of the ordinance. On this part of their case the defendants rely on the decision in *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 669, [16 Ann. Cas. 1061, 98 Pac. 1063]. In that case the plaintiff having been injured in an elevator belonging to defendant company, charged the defendant with negligence in having placed said elevator in charge of an incompetent employee. The complaint did not plead the existence of any ordinance, but the plaintiff introduced in evidence a certain ordinance of the city of Los Angeles making it unlawful for any one to operate any such elevator as that of the defendant, unless licensed to do so; and also proved that the boy in charge of the elevator was not licensed.

In the decision above mentioned the supreme court in ruling that the ordinance was properly admitted in evidence, said: "The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simply evidence offered to show such negligence. Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action." It was further stated, following a Missouri decision, that where the suit is based on an ordinance it should be pleaded, but that where the ordinance is merely sought to be introduced as an evidentiary fact, it need not be pleaded, since it is necessary to plead only the ultimate and substantial facts necessary to state the cause of action. The court further says: "Some of the cases cited by counsel for defendant were cases where it was not attempted to allege any negligence other than the violation of an ordinance, and the ordinance was not well pleaded. If the allegation as to the ordinance was stricken out, nothing remained to show negligence. Of these, *Lake Erie & W. R. Co. v. Mikesell*, 23 Ind. App. 395, [55 N. E. 488], is an example. In such cases it is held that the ordinance must be properly pleaded, and that the complaint should also aver that the ordinance was in force at the time of the occurrence of the act complained of. Such ruling does not appear to us to be inconsistent with our conclusion."

The Indiana case was one where the defendant was charged with negligence in running its train in a manner constituting a violation of an ordinance passed some eight years before. It was held that the complaint was defective in that it did not show that the ordinance was in force at the time of the accident there in question. It was taken for granted, however, that negligence can be pleaded as consisting in the violation of an existing ordinance, where such negligence was a proximate cause of the injury.

Our attention has not been called to any decision other than *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, [16 Ann. Cas. 1061, 98 Pac. 1063], as authority for the proposition that negligence cannot be specially predicated upon the violation of an ordinance, and we see no substantial reason why it may not be done. Our conclusion is that the failure of defendants to deny the existence of said ordinance admitted the fact of its existence and evidence thereof was not necessary. It may be noted here that the complaint in this action specifically alleges that said ordinance was in full force and effect at the time of the accident. "It is the settled rule in this state, under the doctrine of the Californian cases above cited, that the violator of a local ordinance is guilty of negligence *per se*, if such violation contributes proximately to the accident." (*Stein v. United Railroads*, 159 Cal. 368, 372, [113 Pac. 663].)

The defendants contend that they were not in possession of the wagon or timbers at the time that the injuries to plaintiff's automobile were received. We concede the general doctrine stated by defendant's counsel, that the owner of property is not responsible for negligence in the use of that property by an independent contractor to whose possession it has been surrendered for some lawful purpose. In order to constitute such third person an independent contractor it is necessary that he shall have control of the manner in which the contract work shall be done and be responsible only for the results of the work. If the employer retains the right to direct the manner in which the work shall be done, the employed person becomes his servant and the employer remains responsible for negligence of the servant. Upon the facts above stated we conclude that the defendants, after making their contract with Olivares, retained some control

over the manner in which he should do the work. Albert Harris went with the driver and directed in which way he should go to the yard. He personally took part in placing the timbers on the wagon. He was still riding on the wagon after it was started for Santa Monica and after the night was so far advanced that a light became necessary. He personally procured the white light and assisted in placing it on the wagon. The mere fact that he left the wagon and told Olivares to drive on to Santa Monica alone, is not sufficient to relieve the defendants from their responsibility. A similar question arose in *Majors v. Connor*, 162 Cal. 131, [121 Pac. 371], where the supreme court said: "Even if the agreement as originally made could be considered as one whereby Majors became an independent contractor, nevertheless, Connor by assuming to direct the work either personally or through his foreman, took the responsibility upon himself and his co-defendant which might have rested otherwise upon plaintiff." And the court cites 1 Thompson on Negligence, section 658, where that author says: "If the proprietor interferes with the work of the contractor, and directs a particular thing to be done, from which injury results, obviously he will be liable, for it is his own personal act."

Finally, the superior court found upon the evidence that the violation of the alleged ordinance was the proximate cause of the injury in this case, and that the injuries were not caused by the negligence of plaintiff. We think the evidence adequately supports those findings.

The judgment and the order denying a new trial are affirmed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 15, 1914.

[Civ. No. 1430. Second Appellate District.—December 20, 1913.]

**THOMAS LAWYER, Respondent, v. LOS ANGELES
PACIFIC COMPANY (a Corporation), Appellant.**

**ELECTRIC RAILWAY—PERSON WALKING BETWEEN TRACKS—COLLISION
WITH CAR ON WRONG TRACK—CONTRIBUTORY NEGLIGENCE.**—Where
a person who is walking in a public street follows a pathway, used
by pedestrians, between the tracks of an interurban electric rail-
way, and, on the approach of a car from the rear, steps upon the
south track under the mistaken belief that the car is, according to
custom, running on the north track, and is struck by the car, which
is running at a high and unusual rate of speed, without blowing
the whistle or sounding the bell, he cannot, as a matter of law, be
held negligent.

**ID.—ACTION FOR INJURIES—PREPONDERANCE OF EVIDENCE—INSTRUC-
TION TO JURY.**—An instruction to the jury in an action for the
injuries sustained by such pedestrian that "the affirmative of the
issue must be proved, and when the evidence is contradictory the
decision must be made according to the preponderance of evidence.
The weight of evidence, or preponderance of probability, is suffi-
cient to establish a fact in a civil case, and this is a civil case," is
not erroneous in stating that the preponderance of probability is
sufficient to establish a fact in a civil case.

**ID.—EVIDENCE—POWER TO PRODUCE MORE SATISFACTORY PROOFS—ER-
RONEOUS INSTRUCTION—HARMLESS ERROR.**—In such action an
instruction to the jury that "the evidence is to be estimated not
only by its own intrinsic weight, but also according to the evidence
which it is within the power of one side to produce and of the
other to contradict, and therefore if weaker and less satisfactory
evidence is offered, when it appears that stronger and more satis-
factory was within the power of the party, the evidence offered
should be viewed with distrust," though erroneous, when there is
no showing that the party against whom it is directed has failed
to produce his strongest evidence, does not affect his substantial
rights.

**ID.—SOUNDING OF BELL OR WHISTLE—QUESTIONS TO WITNESS REGARD-
ING.**—Where a witness in such an action, who was on the car, testi-
fies that she heard no sound of bell or whistle as the car approached
the place of collision, it is proper to ask her if there was anything
to prevent her from hearing such sound if it had been made.

APPEAL from a judgment of the Superior Court of Los
Angeles County and from an order refusing a new trial.
Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

J. W. McKinley, R. C. Gortner, Frank Karr, Gurney E. Newlin, and W. R. Millar, for Appellant.

Flint, Gray & Barker, for Respondent.

SHAW, J.—Action to recover damages for personal injuries alleged to have been sustained as a result of defendant's negligence.

Judgment for plaintiff was entered in accordance with the verdict of a jury. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

Defendant concedes that it was negligent, but as a defense alleges that plaintiff was guilty of contributory negligence, without which the collision wherein he received the injuries would not have occurred. The court instructed the jury to the effect that, if plaintiff was guilty of negligence which, together with defendant's negligence, contributed directly or proximately to his injuries, then, notwithstanding defendant's negligence, he could not recover. Appellant insists that the jury in rendering a verdict for plaintiff disregarded this instruction, for the reason that the evidence by an overwhelming preponderance thereof shows that his injuries were the result of his own negligence.

The evidence tends to prove the following facts: At the time in question defendant owned and operated an interurban line of double-track, electric railway, extending westerly along Santa Monica Avenue from the city of Los Angeles to points west of Los Angeles. The north track was generally used by defendant in operating its cars westerly and the east-bound cars operated on the south track. On February 17, 1909, plaintiff was a passenger on one of defendant's cars running on the north track from a point east of Vermont Avenue, where, at about 7:30 P. M., he got off the car with the intention of walking thence along Santa Monica Avenue to his home, eight blocks farther west. As far as it extended, which was four blocks, he used the sidewalk on the south side of said avenue, and used the roadway south of defendant's tracks for a distance of one hundred and fifty feet and then followed a path used by pedestrians, which path crossed defend-

ant's south track and meandered between the double tracks, on either side of which space separating these tracks poles were set alternately for the purpose of supporting the trolley wire. It was quite muddy, to avoid which plaintiff, who had many times traveled thereon, followed this path which was used generally by pedestrians traveling along this part of the avenue. The car from which plaintiff got off at Vermont Avenue proceeded on its way westerly to a point several blocks west of the place where it collided with plaintiff, when, owing to the fact that the north track upon which it was running was obstructed, it was ordered back to a point east of Vermont Avenue, known as Melrose Junction, at which there is a cross-over, by means whereof it was switched to the south or east-bound track, over which it in the usual manner proceeded west again. When plaintiff left the sidewalk some four blocks west of Vermont Avenue, he looked back and saw a light there, but could not tell whether or not it was the headlight of a car. After plaintiff had crossed to the path between the tracks and walked about thirty feet he saw in front of him the reflection of a dim light projected from the rear and oscillating on the north track and ground, and about the same time heard a rumbling noise. After first seeing this reflected light he walked some ten feet, being near the north rail of the south track, when upon turning around he saw the car on the south track at a distance from him of some ten feet. He jumped toward the north track to escape this car, but was struck and suffered the injuries for which he claims damages.

Plaintiff had often traveled back and forth from his home along this path and roadway, and knew that it was defendant's custom to operate its west-bound cars on the north track. When picked up after the collision he said: "I didn't think the car was on the south track, as it was the one I used in walking home every night." The car after being switched to the south track was behind its schedule, and thence until it struck plaintiff was operated at a high and unusual rate of speed, without blowing the whistle or sounding the bell, other than on crossing Vermont Avenue some four blocks away. It is conceded that, notwithstanding its custom, defendant had the right to operate the car on the south track.

This evidence is substantially the same as that offered by plaintiff upon a former trial of the case, wherein defendant's motion for a nonsuit was granted and which on appeal from the judgment was by the supreme court reversed. (*Lawyer v. Los Angeles Pacific Co.*, 161 Cal. 53, [118 Pac. 237].) Measured by the rule there stated, and upon the authority of that opinion and the cases therein cited, it is clear that the evidence presents a case where, interpreting it most favorably to defendant, reasonable minds might draw different conclusions upon the question as to whether or not the acts of plaintiff under all of the circumstances constituted negligence. It cannot, therefore, be said as a matter of law that plaintiff was negligent. Waiving what was said by the supreme court in the opinion referred to, the evidence, in our judgment, falls far short of establishing want of due care on the part of plaintiff.

The court instructed the jury that "the affirmative of the issue must be proved and when the evidence is contradictory the decision must be made according to the preponderance of evidence. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case, and this is a civil case." Appellant insists that the court erred in stating that the preponderance of probability is sufficient to establish a fact in a civil case. In support of this contention, its counsel cite several criminal cases wherein the giving of similar instructions has been disapproved. What is said in those cases is not in point, for the reason that the rule with reference to the effect of evidence in a criminal case is very different from that which is applicable to a civil case. In the former guilt must be established beyond a reasonable doubt, whereas in the latter the decision must be made according to the preponderance of evidence. (Code Civ. Proc., sec. 2061, subd. 5.) While the court might very well have omitted the second sentence contained in said instruction, nevertheless, the use of the term "preponderance of probability," as synonymous with the weight of evidence, has received the sanction of the supreme court of this state. (*Murphy v. Waterhouse*, 113 Cal. 467, [54 Am. St. Rep. 365, 45 Pac. 866]; *Hutson v. Southern Cal R. Co.*, 150 Cal. 705, [89 Pac. 1093].) We are therefore constrained to hold that the giving of said instruction was not error.

Complaint is next made that the court erred in instructing the jury that "the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is within the power of one side to produce and of the other to contradict and, therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust." The record discloses no occasion for the giving of this instruction. It was not shown that the evidence offered by defendant was weaker or less satisfactory than other evidence which it might have produced; nor did it appear that it was within its power to produce stronger and more satisfactory evidence. The fact, as claimed by respondent, that defendant knew the names and addresses of persons who were at the time passengers on the car and who were not called as witnesses, did not tend to prove that had they been called their testimony would have been other than cumulative, or that it would have been more satisfactory in support of defendant's contention, than was the evidence of witnesses produced on its behalf. Presumably, defendant offered the strongest evidence within its power to produce. Plaintiff's real complaint is that had these persons been called their testimony *might* have been less favorable to defendant than was the evidence of those who testified. Conceding this to be true, we know of no law requiring a litigant to call a hostile witness for the benefit of his opponent. What was said by Presiding Justice Gray in the case of *Wood v. Los Angeles Traction Co.*, 1 Cal. App. 474, [82 Pac. 547], is particularly applicable to the facts of this case. There a physician in the employ of defendant, who had attended the plaintiff, was called as a witness for the former, but defendant did not call two other physicians who attended plaintiff. In holding that the court did not err in refusing to instruct the jury as provided by subdivisions 6 and 7 of section 2061 of the Code of Civil Procedure, the learned justice said: "This is not a case of the suppression of any evidence, . . . Nor is it a case of the offering of weaker and less satisfactory evidence when it appeared that stronger evidence was within the power of the party."

Since, however, the jury were instructed to view with distrust the evidence offered only in case it appeared to be within

the power of the party offering it to produce stronger and more satisfactory evidence than that offered, and there was no evidence tending to show such fact, it is apparent that defendant's substantial rights were not affected by the error in giving the instruction. In other words, there was no evidence tending to prove the existence of the conditions under which the jury were told to distrust the testimony. (*Brown v. Sharp-Hauser Contracting Co.*, 159 Cal. 89, [112 Pac. 874]. See, also: *People v. Moran*, 144 Cal. 48, 63, [77 Pac. 777]; *People v. Wardrip*, 141 Cal. 229, [74 Pac. 744].) We therefore hold, that notwithstanding the court erred in giving the instruction, such error was without prejudice to defendant's rights.

One of the issues presented by the pleadings was whether or not any warning by blowing the whistle or ringing the bell was given as the car approached the place where the collision occurred. A witness called on behalf of plaintiff, and who was sitting on the front seat next the motorman, was asked: "Now, as you approached Mr. Lawyer did the bell or whistle sound on the car?" to which defendant's objection that it called for a conclusion was overruled, and she answered: "It did not." Thereupon she was asked: "Was there anything to prevent your hearing the sound of that bell or whistle, if there had been one made, sitting where you were?" to which like objection was made and by the court overruled. This last ruling only is assigned as error. The answer called for by the first question was one of the issues submitted by the pleadings to the jury, and the purpose of the question was to elicit evidence from which the jury could determine the ultimate fact in issue. If the witness occupying the position on the car as stated, heard no sound of bell or whistle, such fact, in the absence of some reason, such as deafness, would be evidence that no warning was given. Assuming the first question, to which no objection is here urged, the equivalent of whether she *heard* the sound of bell or whistle, the second question, since she did not hear it, was proper as showing whether, had there been such sound, there was anything to prevent her from hearing it. However this may be, the alleged error was immaterial in that in no event could the ruling have affected the verdict of the jury. What is said

under this head is equally applicable to similar rulings as to questions propounded to other witnesses.

The judgment and order denying defendant's motion for a new trial are affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal was denied by the supreme court on February 18, 1914.

[Civ. No. 1122. Third Appellate District.—December 20, 1913.]

THOMAS A. ROSEBERRY, Respondent, v. RICHARD B. CLARK, Appellant.

WATER-RIGHTS—SPRINGS AND STREAM—PAROL GRANT—ADVERSE USER.

In this action to restrain the defendant from interfering with the plaintiff's use of water from a stream formed by springs situated on the defendant's land, the evidence shows a parol grant to the plaintiff to appropriate the water, followed by all the elements of adverse use under claim of right for more than the statutory period.

ID.—PRESCRIPTIVE RIGHT TO WATER—INJUNCTION TO PROTECT.—If the plaintiff in such case, with the knowledge and acquiescence of the defendant who owns the land on which the springs are situated and who had the prior right to the water, constructed a dam and appropriated the water of the stream notoriously and continuously, under claim of right, for more than ten years, he thereby acquired a prescriptive right to the continued use of the water, entitling him to an injunction against interference by the defendant.

ID.—EXTENT OF RIGHT TO USE WATER—COMPROMISE AGREEMENT—EVIDENCE TO SUSTAIN.—The defendant not only failed to maintain his proposition that the plaintiff's use of the waters of all the springs was a mere permissive use and never developed into a use adverse to the interests of the defendant, but he also failed to maintain his proposition that, by the terms of an agreement upon which a compromise was had in a prior suit involving the same waters, the plaintiff was entitled only to the use of the waters of two springs, and nothing more.

APPEAL from a judgment of the Superior Court of Modoc County and from an order refusing a new trial. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

N. A. Cornish, C. S. Baldwin, and E. C. Bonner, for Appellant.

N. J. Barry, for Respondent.

CHIPMAN, P. J.—This is an action to restrain defendant from interfering with plaintiff's use of certain water. The cause was tried by the court and plaintiff had judgment perpetually enjoining defendant from diverting or otherwise obstructing plaintiff in the use of said water. Defendant appeals from the judgment by the alternative method.

It is alleged in the complaint that for more than twenty years prior to the commencement of the action (complaint filed June 28, 1911), "plaintiff was and now is the owner of the west $\frac{1}{2}$ and the west $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of section 20, township 39 north, range 9 east, in Modoc County; that, upon the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of section 21, and the northwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$ of section 28, said township, there are several springs whose waters flow to a point in the northeasterly part of the northeast $\frac{1}{4}$ of the northeast $\frac{1}{4}$ of section 29, said township, and there unite and flow between well-defined banks in a well-defined channel and would naturally thus flow in a southwesterly direction into what is known as Ash Creek"; that while such owner, and more than twenty years before the commencement of the action, plaintiff "entered upon the northeast $\frac{1}{4}$ of said section 29, where all the waters of said springs were united and were flowing in their natural and well-defined channel and well-defined banks, and constructed a dam in the channel of said stream of sufficient strength and capacity to divert all of the waters flowing in said stream, and then constructed a ditch of sufficient capacity and grade to carry all the waters flowing in said stream from said dam across the N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of said section 29, to and upon the south half of the above described land of plaintiff, and at that time diverted all the waters of said stream into said ditch by means of said dam and by means of said ditch conveyed all the waters of said stream to and upon the south half of said lands of plaintiff"; that at said time one C. J. McCoy and one T. I. Talbott were

the owners of the land on which said springs were located and upon which said dam was located; "that said appropriation of said water, the construction of said dam and the construction of said ditch and the conveyance of said water were made by the permission and with the consent of the said C. J. McCoy and T. I. Talbott; that the plaintiff ever since the construction of said dam and said ditch as aforesaid, has used all of said water upon his said lands and by means of all said water has irrigated the south half of said lands and watered stock thereon, during the irrigating season of each and every year and has made said south half of said land productive and of great value" and has thus raised valuable crops of hay and grain each year for more than twenty years next before this action was commenced; that during all said time since appropriating said waters as aforesaid plaintiff has been in the possession and use of said waters for said purposes "under claim of right and title thereto, and for more than twenty years next preceding the commencement of this action has peaceably, quietly, openly, notoriously, continuously, uninterruptedly, and adversely to the whole world and particularly to the defendant and his grantors and under claim of right and title as against defendant and his grantors, used, diverted, appropriated, and controlled all of the waters of said springs and said stream and has conveyed the same" to his said lands "under claim of right and title peaceably, . . . and adversely . . . and has used said waters upon his said lands" as hereinabove set forth "and is now entitled to use, appropriate, divert, and control said waters" for said purposes, "and would now enjoy the use of the same, except for the wrongful acts of defendant hereinafter alleged." It is then alleged that said lands are situated in an arid climate and are themselves arid and that artificial irrigation is indispensable to the profitable use of said lands, but with the use of all said waters they are and can be made to continue to be profitable for agriculture; that during the month of June, 1911, defendant willfully and wrongfully diverted the waters of said springs and conveyed the same to his own lands and thereby deprived plaintiff of the use thereof and thereby prevented plaintiff from watering his said crops and defendant threatens to continue to divert said waters to plaintiff's injury in the particulars fully set forth.

Defendant denies the material averments of the complaint as to the alleged appropriation of said waters and alleges that, "prior to August 18, 1896, defendant and his grantors, as appropriators and riparian owners, were the owners of the right to use, and did each and every year use all the waters of said springs and said stream, for their lands hereinafter described for watering stock and domestic purposes. That all the use that plaintiff ever had of any of said waters was a permissive use, that is to say at such times as defendant and his grantors were not using said waters for irrigation and other purposes, they would permit the same to pass down from said springs and the said stream, making no objection to said waters at such times being used by plaintiff" but not otherwise, and at all times plaintiff's use "has been subject to the superior rights and subservient to the prior claims and rights of defendant and his grantors." It is further alleged that, about August 18, 1906, defendant transferred and released to plaintiff "two certain springs rising and situate on the northwest quarter of the northwest quarter of section 28," said township, "since which time plaintiff has used the water from said springs without let or hindrance from defendant"; and except as to said two springs plaintiff has no right to any of said waters; denies that defendant has obstructed the waters of said two springs but admits that except as to the waters of said two springs defendant has diverted said other waters; denies that he threatens to interfere otherwise with any of said waters. Defendant then alleges ownership in himself and his grantors, for more than twenty-five years, of the said land in sections 21 and 28 and also certain land in section 20, adjoining plaintiff's land on the east; that up to August 18, 1906, they used all the waters of all said springs on said land for irrigation and domestic purposes and since said above mentioned date defendant has used for like purposes all of said waters except the waters of the two springs above referred to and such use by himself and his grantors has been open . . . and adverse to the whole world and particularly to plaintiff except as above stated. Defendant prays that his rights be determined and he be adjudged entitled to all said waters except as above stated.

The court made findings in favor of plaintiff substantially as alleged in the complaint and found adversely to defendant's averments of the answer.

Briefly stated: Plaintiff claims all the waters involved by prior appropriation and by adverse use for more than the statutory period. Defendant claims that he and his predecessors, during all the time involved and up to about August 18, 1906, appropriated and used all the water involved except as they permitted plaintiff to use the water on occasions when they were not using it and except that about August 18, 1906, plaintiff obtained a right to the water of two springs rising on said section twenty-eight, and that the use by defendant and his predecessors was adverse to plaintiff and the whole world.

Appellant presents but two propositions in his brief: 1. That plaintiff's "use of the waters of all the springs was a mere permissive use and never developed into a use adverse to the interests of McCoy and Talbott, or their successors"; 2. That "by the terms of an agreement upon which a compromise was had, in the suit of *Roseberry v. Vogt*, respondent is entitled to the use of the waters of two springs in the south field (section 28) and nothing more."

1. In support of his first point appellant refers to the averment of the complaint as follows: "That said appropriation of said water, the construction of said dam, and the construction of said ditch, were made by the permission and with the consent of said C. J. McCoy and T. I. Talbott." Reference is also made to some but not all the testimony bearing upon the circumstances under which the appropriation was made. Plaintiff testified that, in the spring of 1891, he constructed a dam in the stream below the point where the water of all the springs united and, by means of a ditch constructed at the same time, he diverted all the water of the stream to and used it upon his land during that irrigating season. This fact is testified to by witness William Henry and witness A. B. Jones, who did the work under plaintiff's direction and assisted in irrigating his land. This dam was situated on the Talbott land (section 29) and at first the ditch was run north to the section line and thence along the line between sections twenty and twenty-nine to plaintiff's land. Plaintiff testified: "Q. Did Mr. Talbott, the owner of the land on which

the dam was constructed, know you were building it? A. I suppose he did; I saw him prior to that time and obtained his consent and permission to construct the dam there. Q. He gave you the right to construct the dam? A. He did." Later there was a change made in the location of the ditch which the witness explained: "A. Mr. Talbott came to me during the fall of 1891, or spring of 1892, and stated, he says: 'Tommy, there is lots of water down there, isn't there, in that stream, more than I thought there was, and I am awful glad you got it; it will irrigate your lands and make them valuable,' or words to that effect; 'but why didn't you dig that ditch right down through my field and then turn it onto your land'? I said, 'Mr. Talbott, I didn't want to dig up your land any more than possible, and I got to the fence as soon as I could and continued down the fence.' He said, 'I would rather it should be there; I will dig that ditch from your dam, and dig it through my field so I can get the percolation, and when you do not want to use the water I will turn it down there.' " Mr. Talbott made the change, extending the ditch beyond where plaintiff used it, and plaintiff thereafter took the water from this new ditch at a point where it passed near the southeast corner of his land. "Q. Was there any change in the use of the water after the new ditch was dug? A. No, sir; I used the water just the same, or always directed the men to do so; if any one else got it it was unknown to me. Q. Did Mr. McCoy, the man who owned the land where the springs were located, know you were making the dam and taking the water to your land? A. He did. Q. Did you ever have a talk with him about it? A. I did. Q. State the conversation. A. Well, prior to the time of building the dam I saw Mr. McCoy regarding the water flowing down, and told him that I wanted to appropriate those waters and take them down to my place, coming from the spring. He told me he would be only too glad for me to do so; that he had thought at one time of building a dam right where his fence crossed one of the streams (pointing on map); this fence is not exactly on the line, but it is supposed to be. There used to be an old lane running through there, and his fence was built north of that lane, which would make a twenty-foot strip of McCoy's land over here in Talbott's land, and he had built a kind of crib right

there a year or two before, and he intended at that time to make a dam out of it, but abandoned that idea, and therefore, he said this would be what he wanted, if I would raise the water up and percolate his land. He had more water than he wanted on his land anyway; it was wet and springy, and this putting a dam in there would be what he wanted; and he not only allowed me to do it, but assisted me in building a levee along there to hold the water in the channel some place along here. (Pointing on map). Q. Did he know you were going to take the water out on to your own land? A. Yes, sir."

There was evidence that plaintiff through his several tenants continued the use of the dam and ditch and the waters of this stream without interruption until, in 1905, the McCoy land had passed into the ownership of one John Vogt and so also had the Talbott land changed ownership. The witness was asked if any interference with his use of the water of that stream had been made since his first diversion, and replied: "There was never any interference or objection that I ever knew of until Mr. John Vogt." This was in 1905 and gave rise to the suit above referred to in defendant's second point. Defendant Clark became the owner of the McCoy land and in 1909 and 1910 he interfered with the use of the water by plaintiff which caused plaintiff to bring the present action. With these exceptions plaintiff testified that his use had never been interfered with. Plaintiff rented his ranch in 1902 and from that time to the present his tenants, as appears from the evidence, used the dam, ditch, and all the water uninterruptedly under plaintiff's claim of right. Witness Shaw testified to having worked on the ranch in 1892, 1893, 1894, and 1895 and that he helped to irrigate the land, using plaintiff's dam and ditch and taking practically all the water. Witness Anderson was plaintiff's tenant for four years, 1893-1896. He testified that he worked on the dam to keep it in repair and on the ditch; that he used all the water and no one else used it during those years and no one claimed it except plaintiff, or interfered with its use. He testified to having had a conversation with Talbott about the water as follows: "The old gentleman asked me how I was getting along with the ranch. I says 'first rate except a little trouble with the dam.' I

says, 'the dam leaks a good deal sometimes and makes a good deal of bother.' He says, 'I wish Tommy'—he always called Mr. Roseberry Tommy—'I wish Tommy would get a good dam in so he can get all that water, because I gave him that water and I would like to see him make good use of it.' "

Witness Harvey farmed the land in 1899. He testified to the uninterrupted use of the dam, ditch, and water on plaintiff's land and that no one else used it or claimed it to his knowledge. Witness Mrs. Ramsey, whose husband, now dead, was plaintiff's tenant in 1897, testified to her husband having irrigated the ranch that year. He could not have done so except by means of this dam and ditch. Witness Taylor was the nominal tenant of plaintiff for the years 1900 and 1901, defendant Clark being the renter in fact. The Talbott land was rented to one Morgan with whom Clark was not on good terms and, in order to avoid trouble about getting water to the Roseberry land, he put Taylor forward as the real renter. Taylor got water for the Roseberry land as others had done by complying with certain requirements made by Morgan which did not, as we read the evidence, carry any necessary implication impeaching plaintiff's right to the water. Witness John Vogt was plaintiff's tenant for the year 1902. This was before he had acquired the McCoy land where the springs were located. He testified that he and plaintiff repaired the dam and ran the water to plaintiff's land and used it by means of the said ditch; that defendant had land rented that year and witness, with plaintiff's consent, allowed defendant to use some of the water once. With this exception witness used all of the water and no claim was made to it by any one except plaintiff. The tenants of plaintiff's land for 1908 were not called, but witness Roberts testified to having "kept track of the crops for Mr. Roseberry . . . measured the hay and kept track of the grain"; that in 1906 he worked on the dam and ditch for plaintiff and brought the water to his land; that for the last number of years crops were raised on plaintiff's land by irrigation; that no one else made any claim to the water and no one interfered with him when working on the dam and ditch. Witness Myers worked with Roberts on the dam and ditch in 1906 and brought the water to plaintiff's land. He testified that John Vogt ordered them

to stop work, but they went on with the work without other interference. Witness John Kresge worked for plaintiff on the dam and ditch in May, 1906, and helped to bring all the water of the stream to plaintiff's land. Vogt told them not to touch the dam, but they "paid no attention to him." Witness Strong testified that he had farmed plaintiff's land as tenant every year since 1905; that he used the dam and ditch in question and the water of said stream which was diverted by the dam; that Vogt did not interfere with his use of the water, but that defendant, in 1909, "shut the water off" and has been "interfering with that water ever since."

It appeared that, in the lease under which John Vogt rented plaintiff's land in 1902, Vogt expressly agreed to "build in a strong and workmanlike manner a rock dam in the stream of water near (describing the dam site) at the point in said stream where there is at present a dam constructed of wood and earth." This dam was to be sufficient to hold the waters of said stream. He also agreed "to widen and clean out the main ditch on the said leased lands so as to flow the waters from said dam easily through and across said leased lands."

Defendant introduced testimony in conflict with the foregoing so far as it related to the use of the water of this stream, but he introduced no evidence controverting the right under which plaintiff originally made his appropriation. We think the evidence showed something more than a permissive use of the water or a mere license. It seems to us that a parol grant to appropriate the water followed by all the elements of adverse use under claim of right for more than the statutory period, is shown.

There can be no doubt that plaintiff made his appropriation under claim of right to the water, with the knowledge and acquiescence of the persons, McCoy and Talbott, having the prior right, and his use was notorious, continuous, and was uninterrupted for certainly more than ten years. Such a use would carry with it a presumptive grant. (*Faulkner v. Rondoni*, 104 Cal. 140, 146, [37 Pac. 883].) But we think plaintiff has shown also a parol grant followed, as we have said, by adverse use. Our conclusion is that appellant has not maintained his first proposition.

2. On February 5, 1906, a second amended complaint was filed in said court in which Roseberry was plaintiff and John Vogt defendant. This complaint is similar to the complaint in the present action except that it alleges that on the said land in said sections 21 and 28 "there are located two certain springs of water." It is further alleged "that all of the waters flowing from said springs unite and form one stream of water," continuing in its averments about as in the present complaint. The purpose of the action was to restrain Vogt, the then owner of the land on which the springs were located, from interfering with the use of the water by plaintiff. On the eighteenth day of August, 1906, while the action was pending, an agreement in writing was executed by Roseberry, Vogt, and this defendant, Clark, reciting the pendency of said action and the desire of the parties to settle the water-right referred to in the action, and agreeing that Roseberry "is the owner of all the waters and water-rights, dams and ditches described in said complaint, and that he is the owner of and has the right to divert, by means of said dam and ditches described in said complaint, all of said waters and use the same upon the land described in the complaint." The agreement seems to have contemplated the dismissal of the action, but, on August 22, 1906, the court made and entered its decree "by stipulation on file herein, that all of the allegations of the complaint are true . . . and findings of fact and conclusions of law having been expressly waived by counsel for the respective parties herein: It is by the court ordered, adjudged and decreed," etc., adjudging plaintiff's right to the water by him claimed and enjoining defendant from interfering therewith.

These proceedings were introduced by defendant for the purpose of showing that plaintiff at that time claimed the water of two springs only, which defendant now contends were the two south springs on section twenty-eight. Plaintiff contends that his reference to two certain springs meant the two groups located on sections twenty-one and twenty-eight whose waters he had long been using. It was conceded by both parties that the complaint, the decree, and the agreement are ambiguous and uncertain and, without objection, both parties introduced testimony to show what was meant

by them in signing the agreement and stipulating as to the decree.

In reply to the question "What waters were involved in that suit?" the plaintiff testified: "A. All the waters flowing down that channel from springs in the S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 21 and the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 28. Q. Did that suit have reference solely to what is known as the springs in the south field? A. Not at all. All the waters coming down those channels and caught up by my dam from all the springs. . . . Q. You understood, did you not, Mr. Roseberry, that you were to have everything you sued for? A. Yes, sir. . . . They simply quit. . . .

Q. You supposed by that agreement that you were to have all the water that came down? A. Yes, sir; most surely, both the north and south springs and all the water, according to the agreement had with Mr. McCoy. Q. Did they understand it that way? A. I don't see how they could help it. Mr. John Vogt and Dick Clark when we were at Auble's—I was foolish enough to go there alone with the rest of the crowd. We talked about it and Dick said, 'I might want to stop a spring.' I said, 'Dick, you never saw me when I was not ready to meet you half way.' Q. Did you say to John, Vogt, or in his presence, that you had settled the matter, and that you both had water? A. No, sir. I had what the complaint called for. Q. And they simply quit? A. Yes, sir." There was testimony introduced by defendant that the understanding was as is now claimed by him and in direct conflict with plaintiff's testimony. There were circumstances connected with the case which, together with the fact that plaintiff had for so many years claimed and used all the water of all the springs, might have led the court to accept plaintiff's testimony. It was accepted by the court and so must it be by us.

In our opinion defendant failed to sustain his second proposition.

The claim that the evidence is insufficient to support certain specified findings of fact we think sufficiently met by the foregoing examination of the evidence.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 1120. Third Appellate District.—December 20, 1913.]

A. H. CARPENTER, Appellant, v. GEORGE H. BRADFORD et al., Respondents.

FOREIGN CORPORATION—SERVICE OF SUMMONS—"DOING BUSINESS" IN STATE AS PREREQUISITE TO JURISDICTION.—Under section 411 of the Code of Civil Procedure it is requisite, in order that a court may acquire jurisdiction over a foreign corporation, that the corporation shall be "doing business" within the state at the time summons is served; and if the proof of an alleged service of summons does not make such a showing, the court is justified in refusing to enter judgment against the corporation.

ID.—LICENSE—FORFEITURE ON FAILURE TO PAY—ACTION TO COMPEL REISSUANCE OF STOCK—PARTIES.—A foreign corporation which has forfeited its right to do business in the state by failing to pay the license-tax, is not a proper party defendant to an action, brought by one who has acquired shares therein since such forfeiture, to compel the reissuance of stock. Such action can be maintained, if at all, only against the directors as trustees of the corporation.

ID.—PURCHASER OF STOCK—RIGHT TO COMPEL REISSUANCE.—The directors of a foreign corporation which, through failure to pay the license-tax, has forfeited its right to do business in the state, cannot be compelled to reissue stock to one who, at an execution sale subsequent to such forfeiture, purchased the shares belonging to and standing in the name of the judgment debtor.

ID.—REMEDY OF PURCHASER—ACCOUNTING—PARTICIPATION IN ASSETS OF CORPORATION.—But it does not follow that such purchaser is without remedy; if he has succeeded to the interest of one of the stockholders, he is entitled to an accounting and to participate in any distribution of the assets of the corporation.

APPEAL from a judgment of the Superior Court of San Joaquin County. C. W. Norton, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

O. B. Parkinson, for Respondents.

BURNETT, J.—The vital question involved in this appeal is whether the directors of a foreign corporation, after it had

forfeited its franchise to do business in this state by reason of its failure to pay the license-tax, can be compelled to re-issue stock to one who purchased, at an execution sale subsequent to said forfeiture, the shares belonging to and standing in the name of the judgment debtor.

It is alleged, in the amended complaint, that "said corporation neglected and refused to comply with the statutes of this state requiring it to pay an annual tax to the secretary of state for its license to do business, as such foreign corporation, within the state of California, for the year 1907, and thereafter on the 30th day of November, 1907, it forfeited all its said rights and privileges under the laws of this state to do or transact any business as such corporation within the state of California." It further appears therein that, on January 20, 1908, said execution sale occurred and plaintiff became the purchaser and secured from the sheriff the certificate of sale of 333,005 shares of the capital stock of the corporation and "on or about the 20th day of January, 1908, at Stockton, California, plaintiff herein handed to said defendant trustees and executive and proper officers of said corporation said certificate of sale, so received from said sheriff, and then and there demanded, and on divers days and times since said date has demanded, that a proper certificate of stock or other evidence showing his interest in said corporation and the property thereof be issued to him for the stock so purchased at said sheriff's sale," but that defendants refused and have ever since refused to comply with plaintiff's demand or to take any action in the matter at all.

When the case came up for trial objection was made to the introduction of any evidence on the ground that the corporation having no right to do business "and no certificates of stock in legal effect, no evidence can be introduced for the recovery of certificates of stock." The judge, in sustaining the objection, stated: "I am satisfied that these trustees or directors of this Three Star Company are without power to issue certificates if they wished to do so under the law." Then, advertng to the allegation of damages in the complaint, he inquired if plaintiff desired to put in any evidence as to that and plaintiff stated: "If the defendants were not bound to issue certificates of stock or to recognize plaintiff's right

to any interest in said corporation or the property thereof, we do not think evidence of such damage would be admissible. We now move for a judgment against the Three Star Company, a corporation organized under the laws of the territory of Arizona, in accordance with the prayer of the amended complaint, the default of said defendant having been duly entered by the clerk, the record showing service upon the secretary of said corporation." This motion was denied "on the ground that the court has no jurisdiction of said corporation." Whereupon the action was dismissed with costs in favor of the individual defendants who had appeared.

The refusal of the court to enter judgment against the corporation is justified on two grounds: 1. There was no sufficient proof of service upon said corporation, the affidavit as to the summons showing that N. W. Mahaffey served it on the said Three Star Company "by handing to and leaving with George A. Brown, Jr., personally, who was secretary of said corporation, in the county of San Joaquin, state of California, a copy of said summons," etc., and there is a similar affidavit of the service of the amended complaint. There was no showing that at the time of said service or, indeed, at any time, the said foreign corporation was *doing business* in California. In fact it sufficiently appears that when the attempted service was made, the corporation was not doing and had no authority to do business in this state. "Section 411 of the Code of Civil Procedure declares that the summons in a civil action must be served by delivering a copy thereof . . . '2. If the suit is against a foreign corporation, doing business in this state and having a managing or business agent, cashier or secretary within this state, to such agent, cashier or secretary.' Under the provisions of this section, in order that the court may get jurisdiction over a foreign corporation, it is requisite that such corporation shall be 'doing business' within the state at the time the summons is served, and that the service shall be made upon its agent who is managing that business, or upon its cashier or secretary. . . . By reason of the allegation in the complaint that the appellant is a foreign corporation, it became incumbent upon the plaintiff to show that, at the time of the service, it was doing business within the state."

(*Jameson v. Simonds Saw Co.*, 2 Cal. App. 586, [84 Pac. 289]. See, also, *Herron Co. v. Westside Electric Co.*, 18 Cal. App. 778, [124 Pac. 455].)

Again, the corporation was not a proper party defendant. The cause of action, if any, could be maintained only against the directors as trustees of said corporation. As stated in *Reed & Co. v. Harshall*, 12 Cal. App. 704, [108 Pac. 719]: "By section 102 of an act of the legislature of 1907 (Stats. 1907, pp. 746, 747), amendatory of the act of 1905 (Stats. 1905, pp. 493, 494), requiring the payment by corporations of an annual license-tax to the state, it is provided that the directors or managers in office of a domestic corporation, whose charter is forfeited, or of a foreign corporation whose right to do business in this state is forfeited, because of failure to pay such tax, are deemed to be the trustees of such corporation and the stockholders and members of such corporation, and have full power as such trustees, to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, etc." It is further provided in said statute that "Such directors or managers, as such trustees, may be sued in any of the courts of this state by any person having a claim against any of said corporations." Such foreign corporation is not exactly "defunct," as claimed by respondents, as the state cannot take away its charter, but it is at least a case of "suspended animation." It can do nothing as a corporation in this state and the only recognition to be accorded it by the courts here is in the settlement of its affairs and this is to be accomplished through the agency of said trustees.

The cases cited by respondents, *Kaiser Land & F. Co. v. Curry*, 155 Cal. 638, [103 Pac. 341]; *Lewis v. Curry*, 156 Cal. 95, [103 Pac. 493], and *Lewis v. Miller & Lux*, 156 Cal. 102, [103, Pac. 496], directly involve domestic corporations, but the opinions are instructive as to the significance and scope of the license-tax legislation.

In the last of these it is said: "The directors of the corporation having taken charge of its affairs as trustees as provided in section 400 of the Civil Code and the corporation having ceased to exist, neither the corporation itself nor its directors can be compelled to continue to do business by re-

issuing stock transferred from one of its stockholders to another person." Although it may not be accurate to say here that the "Three Star Company," being a foreign corporation, has "ceased to exist," yet, as far as its powers and activities in this state are concerned, it is in exactly the same situation as the corporation considered in the said *Miller & Lux* case. If the statute already quoted left any doubt as to this it should apparently be removed by a consideration of section 9 of said act of 1905, providing that "Any person or persons who shall exercise any powers of a foreign corporation which shall have forfeited its right to do business in this state, shall be guilty of a misdemeanor." The said corporation and its directors having no authority to transact any corporate business or to exercise any corporate power whatever in this state, the court was right in finding that the defendants could not be compelled to make the requested reissue of stock.

It does not follow, however, that plaintiff is without remedy. If he has succeeded to the interest of one of the stockholders he is entitled to an accounting and to participate in any distribution of the assets of the corporation. It is said, in *Lewis v. Miller & Lux*, 156 Cal. 102, [103 Pac. 496]: "The holders of such stock by assignment, of course, have a right to participate in the division of the corporate assets by virtue of such ownership, but the machinery of the corporation has been superseded by that of the parties in liquidation, and they cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof."

Appellant contends that the refusal of defendants to issue the stock and to recognize his right to any interest in the property amounted to "an unlawful conversion for which action would lie; and this would be true even if the defendant had been a domestic corporation and had forfeited its charter; and in such case it would have been legally obligated to recognize plaintiff's right or interest in the corporation or its property (*Kimball v. Union Water Co.*, 44 Cal. 175, [13 Am. Rep. 157]; *Ralston v. Bank of California*, 112 Cal. 208, [44 Pac. 476]; *Ashton v. Heggerty*, 130 Cal. 516, [62 Pac. 934]; *Craig v. Hesperia Land etc. Co.*, 113 Cal. 8, [54 Am. St. Rep. 316, 35 L. R. A. 306, 45 Pac. 10]), and the

interest in the value of the stock would be the damages that the plaintiff was entitled to recover. (*Black v. Vermont Marble Co.*, 137 Cal. 683, [70 Pac. 776]; *Kelley v. McKibben*, 54 Cal. 192.)"

The cases cited apply to "going" concerns, but, if we accept the theory of appellant as thus stated, it can be of no avail to him as he declined to offer any evidence that he was damaged by the action of defendants, the answer of the individual defendants having denied "that any shares of stock of said corporation at the time alleged in said complaint, or at any other time was, or that the same is of the value of one dollar per share or of any value whatever." It may be said that all the other material allegations of the complaint were denied in said answer and no attempt was made to prove any of them with the single exception hereinbefore pointed out. In fact, appellant rested upon the contention that it was the duty of defendants to reissue to him the said stock. It may be that his complaint was broad enough to entitle him to the relief hereinbefore suggested if he had insisted upon it.

It may be observed, also, that the determination of the trial court was in effect a judgment of nonsuit and, of course, it will not preclude appellant from hereafter asserting and maintaining by an appropriate method of procedure whatever legal claim he may have to any assets of said corporation.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 18, 1914.

[Civ. No. 1326. Second Appellate District.—December 24, 1913.]

C. HERBERT DIAMOND, Appellant, v. F. E. FAY,
Respondent.

BROKER—CONTRACT TO PROCURE LESSEE—PAROL EVIDENCE TO VARY—COMMISSIONS.—In an action by a real estate broker to recover commissions on a contract employing him to procure a purchaser or lessee for certain property, testimony tending to show the agreement to have been that the plaintiff's right to commissions was to accrue only in case a lease of the property was made by the defendant and then that such commissions were to be paid out of the first money received from the lessee, is improperly received as being an attempt to vary the terms of the written contract, where the phraseology of the contract contains no suggestion of any such conditions, and there is no room for the claim that the language therein used is ambiguous or indefinite in any of the particulars referred to, and the defendant makes no claim of excusable mistake.

ID.—FINANCIAL ABILITY OF PROPOSED LESSEE—REFUSAL OF LESSOR TO EXECUTE LEASE.—But error in the admission of such testimony is nonprejudicial, if it is found upon the entire evidence adduced that the tenant proposed by the broker did not produce satisfactory evidence of his financial ability to respond to the obligations of the proposed lease, and for that reason the owner refused to accept him as a lessee.

ID.—CONTRACT TO PROCURE LESSEE—WHEN FULFILLED.—The engagement of a real estate broker who proposes to secure a tenant for an owner of real property is, that he will present a satisfactory person who is ready, able, and willing to enter into such a lease as is proposed to be made by the owner.

APPEAL from a judgment of the Superior Court of Los Angeles County. Franklin J. Cole, Judge presiding.

The facts are stated in the opinion of the court.

H. T. Morrow, for Appellant.

Trippet, Chapman & Biby, and Lucien Clark, for Respondent.

JAMES, J.—Defendant was the owner of a lot of land on one of the principal streets of the city of Los Angeles

which he desired to sell or lease. Plaintiff, a real estate broker, was authorized in writing by defendant to find a purchaser for the property, or a tenant who would lease it for five or ten years. The written authorization which was signed by the defendant contained the following condition: "And it is agreed, that in case he shall secure a purchaser or tenant for said property I agree to pay him the regular brokerage or commission for selling i. e., a sum equal to 5% on the first \$1,000, and 2½% on the remainder of the purchase price accepted by me, provided that no commission shall be less than \$100, said commission to be paid out of the first money received. In case of a lease, will pay the commission on usual basis."

Plaintiff in his complaint alleged that pursuant to the authority so given he found a person who was ready, able, and willing to rent and lease the property of defendant for a term of ten years at the required monthly rental, and that defendant had refused to enter into any lease. The prayer of the complaint was for an amount of money which was alleged to be the customary and usual commission allowed to brokers and the reasonable value of the services expended in that behalf. In his amended answer defendant admitted the execution of the contract set out in plaintiff's complaint, and then alleged that the contract did not clearly set forth the true terms of the agreement in that it had been agreed that the compensation of plaintiff would be earned only when he had secured a person satisfactory to defendant who would lease the property for ten years, and that compensation was only to be paid in case a lease was actually made, and then it was to be taken out of the first money received on such account. It was further alleged that plaintiff did introduce to defendant a prospective tenant and that the defendant, desiring to be informed and satisfied of the ability of this person to pay the rent as contemplated, requested the latter to furnish a statement in writing showing what his financial ability was, which writing was promised to be produced, that it had never been furnished to the defendant, and that through no fault of his he did not make a lease of the property. The amended answer also contained a denial that plaintiff ever produced a proposed tenant who was ready, able, and willing to lease the property on the terms

proposed. The action was tried before the court sitting without a jury, and findings and judgment followed in favor of defendant. The appeal is taken from that judgment and is presented on the judgment-roll and a bill of exceptions.

The trial judge by his findings determined the contract of employment of the plaintiff to have been made in the terms set out in the amended answer. It may be here stated that all of the testimony which was admitted tending to show the agreement to have been that plaintiff's right to commissions was to accrue only in case a lease of the property was made by defendant and then that such commissions were to be paid out of the first money received from the lessee, was improperly received as being clearly an attempt to vary the plain and unambiguous terms of the written contract. The phraseology of the written authorization given by defendant to plaintiff to lease the property contained no suggestion of any such conditions, and there seems to be no room for the claim that the language used was ambiguous, indefinite, or uncertain in any of the particulars referred to. Defendant made no claim of excusable mistake and presented no facts to substantiate any such contention. He testified that he had had long years of business experience and that he read the contract over carefully before he signed it. The engagement of a real estate broker who proposes to secure a tenant for an owner of real property is that he will present a satisfactory person who is ready, able, and willing to enter into such a lease as is proposed to be made by the owner. The business to be conducted in the leased premises must also be legitimate and lawful. It has been held that the requirement as to the agent's obligation in the matter of a lease is not different from that assumed where the purpose of the agency is to procure a purchaser instead of a tenant. (*Tanenbaum v. Boehm et al.*, 202 N. Y. 293, [95 N. E. 708].) There is some ground to doubt the legal correctness of this holding, however, as there are reasons why a landlord might with propriety refuse to enter into an engagement to lease his property to an individual, notwithstanding that such individual in a strictly commercial sense might be ready, able, and willing to enter into a lease of the kind designed to be executed. The reputation of the person might be such as to entitle the landlord to urge as a substantial reason that

the proposed tenant was not satisfactory to him. Other conditions than that imagined for the purpose of illustration might be presented which would give to the landlord the option to refuse to contract with the person produced by the broker. Such reasons are sufficient, if of a substantial kind and such as may properly be deemed to be a part of the consideration for which the landlord lets his property; they must amount to something more than the satisfaction of mere notion or caprice. (*Mullally v. Greenwood* 127 Mo. 138, [48 Am. St. Rep. 613, 29 S. W. 1001].) However, as the case is presented on the evidence shown in the record, it does not become necessary to apply any but the standard rule affecting the matter as to when an agent employed to sell real property may be said to have earned his commission. As prefacing the consideration of the evidence, it is well to suggest the familiar rule which requires that if any evidence is shown in the record which will support the findings of the trial court, the judgment must be upheld. In this case by the testimony of the defendant it is made to appear that the proposed tenant did not produce satisfactory evidence of his ability to respond to the obligations of the long time lease which he proposed to make with the defendant. Defendant testified that he was referred to two persons by the proposed tenant, neither of whom gave him any assurance that the proposed tenant would be able to fulfill all of the obligations of the lease contract; these persons vouched for the integrity of the man, and one of them said that he might be inclined to "overreach himself." Defendant testified further that he requested a written statement to be made by the applicant for the lease, showing his financial worth, but that this statement was not forthcoming. He testified that plaintiff had made an oral statement that his client was worth twenty thousand dollars or twenty-five thousand dollars. He testified: "I didn't make a lease to Mr. Kreiter because I never had a statement from Mr. Kreiter in regard to his financial ability which satisfied me. I asked him for a written statement of his assets and liabilities and twice he started to do it, and was interrupted by Mr. Diamond and did not finish it. I handed him a paper in my office to write out a statement of his financial ability, and, as I supposed, he started to do it; just at that time Mr. Diamond called him away and when

he returned they were talking about something else and he didn't finish it. . . . The fact that I had a tenant in there who refused to vacate without a bonus was one of the reasons why I did not lease to Mr. Kreiter. That was not the whole reason. I was never satisfied with Mr. Kreiter's ability and standing and integrity. I didn't have facts enough to base an opinion upon Mr. Kreiter's financial ability. I had gone to Mr. Thomas with Mr. Kreiter, and that was not assuring of Mr. Kreiter's financial ability to carry out such an agreement as he proposed to enter into; neither was the statement of the man at the bank." The foregoing quotation from the defendant's testimony, which is but a small part of that given by him, is sufficient to afford a basis for the finding of the court wherein all of the allegations of paragraph one of the amended answer of defendant are determined to be true. Leaving out of consideration the allegations as to the imperfection of the contract as therein made, sufficient was alleged, as before noted, to present the issue as to whether the proposed tenant gave satisfactory evidence of his ability to carry out the terms of the proposed lease contract. While a part of the findings relating to the making of the contract justifies the criticism that it presents an inconsistency as to the facts, and it is quite clear that the court committed error in allowing testimony to be introduced to vary the plain import of certain terms of the contract, nevertheless, in view of the fact that the finding upon the material matter as to lack of performance made by plaintiff under the contract is sustained by the evidence, the errors adverted to become immaterial and nonprejudicial.

The judgment is affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. 1419. Second Appellate District.—December 24, 1913.]

J. J. STADLER, Administrator of the Estate of **Mary J. Quesenberry**, Deceased, Appellant, v. **PACIFIC ELECTRIC RAILWAY COMPANY** (a Corporation), Respondent.

ELECTRIC RAILWAY—PASSENGER ALIGHTING FROM CAR—COLLISION WITH CAR ON ANOTHER TRACK—DURATION OF RELATION OF CARRIER AND PASSENGER.—In an action against an electric railway company for the death of a passenger who, upon alighting from a car, was struck by a car approaching on another track, an instruction that the relation of passenger and carrier did not cease at the moment she alighted from the car, but that it continued until she had a reasonable time and opportunity to leave the premises of the railway company, and that during such time the railway company owed to her the highest degree of care, embodies a correct statement of the law applicable to the case.

ID.—SPEED OF CARS—RIGHT AND DUTY OF RAILWAY CONCERNING—PLEADING—INSTRUCTIONS.—In such action an instruction that "at the place where this accident is shown to have occurred there was no law regulating the speed of cars; the defendant had a right to propel its cars at any rate of speed which was consistent with the exercise of due care in the business of railroading," is not objectionable in that propelling the cars at an unlawful speed was not an issue tendered by the pleadings, when it is alleged in the complaint that the death of the deceased was the direct and proximate result of "the negligence of defendant in the operation of its electric cars."

ID.—UNLAWFUL SPEED OF CAR—ADMISSIBILITY OF ORDINANCE TO SHOW.—Whether the rate of speed of the car was unlawful was, under the general allegation of negligence, a proper subject for inquiry, under which an ordinance fixing such rate might have been introduced.

ID.—PLEADING NEGLIGENCE—GENERAL ALLEGATIONS—EVIDENCE ADMISSIBLE UNDER.—While the specific acts constituting negligence were not alleged in the complaint, nevertheless, under the general allegation, evidence showing either that the cars were propelled at an unlawful speed contrary to law, or that, in the absence of such law, the rate of speed was such as under the circumstances constituted negligence *per se*, is competent.

ID.—DUE CARE—INSTRUCTIONS CONCERNING.—In the instruction that the "defendant had a right to propel its cars at any rate of speed which was consistent with due care in the business of railroading,"

the expression "due care" means such degree of care as the defendant owed to the deceased, and this depended upon the conclusion reached by the jury as to whether or not she was, when struck by the car, a passenger of the defendant; if she was, then "due care" was the highest degree of care.

ID.—INSTRUCTIONS—USE OF EXPRESSION "BUSINESS OF RAILROADING."

The words "business of railroading" in such instruction could not refer to the operation of a freight train or to any business included within the term other than the carrying of passengers for hire, when it was alleged in both the complaint and answer that the defendant was at the time of the accident engaged as a common carrier of passengers, and the question at issue was whether the plaintiff's intestate was killed as a result of the defendant's negligence while being transported by the defendant as a passenger.

APPEAL from an order of the Superior Court of Los Angeles County refusing a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

A. E. Park, and E. B. Drake, for Appellant.

J. W. McKinley, and R. C. Gortner, for Respondent.

SHAW, J.—Action to recover damages for the death of plaintiff's intestate, Mary J. Quesenberry, which is alleged to have occurred in an accident due to defendant's negligence in the operation of its electric cars.

The case was tried before a jury which brought in a verdict for defendant. Judgment followed; plaintiff moved for a new trial, which motion was denied, and he appeals from said order denying his motion.

The facts, so far as required to elucidate the alleged errors, are as follows: At the time of the accident defendant was the owner and engaged as a common carrier of passengers in the operation of an interurban electric line of railway consisting of four tracks extending from the city of Los Angeles in a southerly direction to the city of Long Beach and other towns. At a point where the tracks cross what would constitute Thirty-ninth Street if projected, the railway company owns the right of way, which is fenced so as to prevent vehicles from crossing the tracks, but having openings therein for egress

and ingress of pedestrians. The two inner tracks were used in the operation of through cars which did not stop at Thirty-ninth Street. The through south-bound cars were operated on the westerly of these two inner tracks, and the through north-bound cars were operated on the easterly inner track. The two outer tracks were used in the operation of cars doing local business and stopping at Thirty-ninth Street for passengers getting on and off the cars at that point. For their convenience, the railway company had constructed a dirt walk or passageway some ten or fifteen feet in width and flush with and extending across the tracks, at both ends of which walk and next to the outer tracks was a dirt platform at which the local cars stopped to take on and let off passengers. On the evening in question, it being dark, the deceased boarded a local car in Los Angeles, which ran south on the westerly track, and which upon arriving at the Thirty-ninth Street station stopped at the dirt platform on the outer side of the track, where she got off the car, which proceeded on its way south. After this car left the station, she started east across the tracks, at which time a local car going north on the easterly track approached and as usual stopped at the dirt platform on the east side of the north-bound local track. At the same time a through car was approaching rapidly from the north and a through car approaching from the south, though at the time distant some hundred feet farther than was the south-bound car, the two passing each other near this point. Deceased proceeded, reaching a point between the two through tracks, which are nine and one-half feet distant apart, apparently without seeing the approach of the south-bound through car. She was dressed in black, and, owing to the fact that the track was oiled and black, was not seen by the motorman of this car until he was within seventy-five feet of the point where she was struck by the step of said south-bound car and killed. All the cars had their headlights burning, and the fact that they were at the time but a short distance away approaching the crossing, the north-bound local car having reached the dirt platform where it stopped, thus blocking her way, must have been apparent to one fully acquainted, as she is shown to have been, with the operation of the cars at that point.

Appellant's theory and that upon which the case was tried, as alleged in the complaint, was that upon plaintiff's intestate being discharged from the car upon defendant's right of way so used as a station for taking on and discharging passengers from its local cars, "and before she had been able to leave the said private right of way, . . . by reason of the negligence of defendant in the operation of its electric cars, the plaintiffs intestate was struck by one of its said electric cars being then by it operated south-bound on the west inside track." He contends that the relation of carrier and passenger between defendant and deceased did not cease until she had had reasonable time to leave the grounds of the carrier. This proposition must be conceded. At the request of plaintiff the court instructed the jury in effect that if they believed from the evidence that the decedent did not have "a reasonable time or opportunity to leave the defendant's said premises going in the direction ordinarily taken to her home, . . . before she was struck by defendant's car, then I instruct you that the duty of defendant to her as a passenger did not cease the moment she alighted from its car at the place selected by it for the discharge of its passengers, but, on the contrary, that the relation of passenger and carrier, which had theretofore existed between them while she was being carried by it in its car, remained until she had had a reasonable time or opportunity to thus leave the place where she alighted from defendant's car. In that event, it was the duty of the defendant to use the highest degree of care to make this way of egress reasonably safe; and a failure, if any, to perform such duty to her on the part of defendant was negligence." And further: "You are instructed that under the Civil Code of the state of California, . . . a carrier of persons for reward or hire must use the utmost care and diligence for their safe carriage and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill. You are, therefore, instructed that if you shall believe from the evidence that at the time plaintiff's intestate was stricken she was still a passenger of the defendant, as defined in these instructions, then I instruct you that they owed her the utmost or highest degree of care in protecting her from injury while crossing the defendant's car tracks by such passageway, even though she had left its car." We think this instruction em-

bodies a correct statement of the law applicable to the case. By it the jury was instructed that the relation of passenger and carrier did not cease at the moment she alighted from the car, but that such relation continued until she had a reasonable time and opportunity to leave the premises of defendant, and that during such time defendant owed to her the highest degree of care. If plaintiff desired further instructions "defining the duties of a carrier to a passenger" he should have requested the court to give the same. He did not so request.

Appellant next complains of the giving of the following instruction: "At the place where this accident is shown to have occurred there was no law regulating the speed of cars. The defendant had a right to propel its cars at any rate of speed which was consistent with the exercise of due care in the business of railroading." The first objection urged to this instruction is that propelling the cars at an unlawful speed was not an issue tendered by the pleadings. It was alleged in the complaint that the death of deceased was the direct and proximate result of "the negligence of defendant in the operation of its electric cars." While the specific acts constituting negligence were not alleged, nevertheless, under the general allegation, evidence showing either that the cars were propelled at an unlawful speed contrary to law, or that, in the absence of such law, the rate of speed was such as under the circumstances constituted negligence *per se*, was competent. "Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action." (*Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, [16 Ann. Cas. 1061, 98 Pac. 1063].) It is true that in the case of *Cooper v. Los Angeles Terminal R. Co.*, 137 Cal. 229, [70 Pac. 11], there is an intimation to the effect that where the complaint failed to allege an unlawful rate of speed, but did aver that at the time of the accident, which occurred at a crossing, the train was being propelled at a rapid and dangerous rate of speed, an instruction requested that "the evidence produced upon the trial of this action fails to show that defendant's train which collided with plaintiff's vehicle, and thereby injured her, was being at the time of such collision run at an unlawful or reckless rate of speed," was properly refused upon the ground that it usurped the province of the jury whose duty it was to determine the ques-

tion as to whether the train was run at a reckless rate of speed. In the course of the opinion the court stated: "If there were no other objection to the instruction, it was properly refused because it did not apply to the cause of action set forth in the complaint." This statement, if not *dictum*, is not the law. "Evidence that the party was acting in violation or neglect of a statute or ordinance regulating the mode of conducting vehicles, is always admissible in such a case, as tending to show negligence in the one guilty of the omission." (*Harrison v. Sutter St. Ry. Co.*, 116 Cal. 156, [47 Pac. 1019].) Whether the rate of speed was unlawful was, under the general allegation of negligence, a proper subject for inquiry under which an ordinance fixing such rate might have been introduced. There is, therefore, nothing in the objection first made to the instruction. No evidence whatever was offered tending to show the existence of any law regulating the speed of cars at the point in question, and that part of the instruction complained of was strictly in accord with the facts.

The jury was told that "defendant had a right to propel its cars at any rate of speed which was consistent with due care in the business of railroading." In referring to negligence, "due care" means such care as the law requires under the particular circumstances of the case. The term is relative and its application depends upon the degree of care and vigilance which the situation of the parties and the circumstances impose. A degree of vigilance on the part of defendant which would have constituted "due care" as to a trespasser on its grounds, would not be due care as to one occupying the alleged relation of deceased to defendant, which was that of a passenger. If the measure of diligence required under the circumstances of the case is a less degree of vigilance than the highest degree of care, then the exercise of such lesser degree is "due care" in such case; but if, on the contrary, the circumstances are such as to require the highest degree of care, then less than such degree is not "due care." In this case the court instructed the jury as to what constituted the relation of passenger and carrier, and told the jury that if such relation existed between defendant and plaintiff's intestate at the time of the collision, then defendant owed her the highest or utmost degree of care. In other words, the instructions taken as a whole told the jury that

defendant was required to use due care in the rate of speed at which it propelled its cars, which degree of care, in case they found that deceased was, as claimed by plaintiff, a passenger when struck by the car, was the highest degree of care. Therefore, "due care" was such degree of care as defendant owed to deceased, and this depended upon the conclusion reached by the jury as to whether or not she was at the time when struck by the car a passenger of defendant. If she was, then "due care" was, as the court had repeatedly stated to the jury, the highest degree of care.

A further criticism of the instruction is the use therein of the words "business of railroading." It is alleged in both the complaint and answer that defendant was, at the time, engaged as a common carrier of passengers, and the question at issue was whether plaintiff's intestate was killed as a result of defendant's negligence while being transported by defendant as a passenger. Hence, the "business of railroading" could not refer to the operation of a freight train or to any business included within the term other than the carrying of passengers for hire, as alleged in the complaint and answer.

Appellant suggests that, in lieu of said instruction, the court should have instructed the jury as follows: "The defendant had a right to propel its cars at any rate of speed which was consistent with the exercise of due care in the transportation of passengers at the time and place in controversy." As stated, the instruction given could not have been understood by the jury as referring to any business transaction by defendant other than the transportation of passengers; nor could it have been understood as having reference to any other time and place than that alleged in the pleadings. Moreover, plaintiff did not ask for such modification of the instruction. While we do not regard the instruction given as a model, nevertheless, the giving of it was not error.

The order denying the motion for a new trial is affirmed.

Conrey, P. J., and James, J., concurred.

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[Civ. No. 1421. Second Appellate District.—December 26, 1913.]

JOSEPH MESMER, Appellant, v. THE BOARD OF PUBLIC SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES et al., Respondents.

MUNICIPAL CORPORATION—AMENDMENT OF CHARTER—BOARD OF PUBLIC SERVICE COMMISSIONERS — CONSTITUTIONAL LAW.—The amendments to the freeholders' charter of the city of Los Angeles, creating a board of public service commissioners and giving it control of the revenues derived from the sale of water, are not violative of section 13 of article XI of the constitution, which prohibits the legislature from delegating municipal functions to special commissions.

ID.—FREEHOLDERS' CHARTER—APPROVAL BY LEGISLATURE—POWER TO CHANGE.—The legislature has no power to mould or change a freeholders' charter of a city when such instrument is before it for approval.

ID.—APPROVAL OF FREEHOLDERS' CHARTER BY LEGISLATURE—WHETHER AN EXERCISE OF LAW-MAKING POWER.—The legislature does not, when it approves by resolution a freeholders' charter for a city, exercise law-making power in the sense intended to be expressed in the prohibitory clause of the constitution, that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever."

ID.—MUNICIPAL CHARTERS—WHETHER SUPERIOR TO GENERAL STATE LAWS.—Municipalities are now given the power to draft charters whose provisions, in so far as they refer to municipal affairs, are superior to the general state laws. The legislature cannot enact any law which will repeal or change such charter provisions.

ID.—PUBLIC SERVICE COMMISSIONERS—POWERS—PURCHASE OF GROUND AND ERECTION OF BUILDING.—The board of public service commissioners of the city of Los Angeles has power, under the freeholders' charter, to purchase ground and erect thereon an administrative building for its uses, the cost thereof to be paid from the revenue of the water department.

ID.—CITY INDEBTEDNESS—CONSTITUTIONAL LIMIT.—Section 18 of article XI of the constitution, which forbids a city from incurring any indebtedness exceeding in any one year the income and revenue

provided in such year, without the favorable vote of two-thirds of the electors, is not applicable to the board of public service commissioners in carrying on such an undertaking.

APPEAL from a judgment of the Superior Court of Los Angeles County. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

H. S. McCallum, and Hutton & Williams, for Appellant.

Albert Lee Stephens, City Attorney, and Geo. E. Cryer, Assistant City Attorney, for Respondents.

JAMES, J.—A demurrer interposed to the amended complaint of plaintiff was sustained, and this appeal was taken from the judgment of dismissal which followed.

By the provisions of a freeholders' charter of the city of Los Angeles, adopted in 1903, there was created a water department which was provided to be placed under the control of a board consisting of five members. In March, 1911, an amendment to the charter was regularly adopted, by which amendment a department of public service was provided for, which department, in addition to being given charge of the water service, was given control and management also of such electric works and electric systems as might thereafter be acquired. The board of public service commissioners created under the latter amendment became the successors of the board of water commissioners first referred to. Plaintiff's complaint set out that the last named board, on the eighth day of November, 1909, for the purpose of acquiring property upon which to erect a building for the uses of its department, contracted to purchase a lot in the city of Los Angeles for the sum of one hundred and ninety-five thousand dollars, payable five thousand dollars in cash, the balance to be represented by two mortgages, one for the sum of seventy thousand dollars, and one for the sum of one hundred and twenty thousand dollars. It was further set out that out of the income and revenue arising from the water department, at the time of bringing the action, a total of one hundred and fifteen thousand dollars besides certain installments of interest, had been paid on account of the purchase price of the lot, and

that excavation had been made thereon to accommodate a foundation for the proposed building. Further, that the moneys contracted so to be paid exceeded the income and revenues of the water department for the year mentioned, and that the board threatened to execute a contract which would provide for the erection and completion of the proposed building. An injunction was prayed for, that defendants be enjoined from making any further payments on account of the purchase price of the lot, and from entering into a contract for the erection of the building.

It is appellant's contention that the charter provisions which gave to the board of water commissioners and its successor, the board of public service commissioners, control of the revenues derived from the sale of water are unconstitutional as violative of section 13 of article XI of the constitution, which provides as follows: "The legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." The provisions of this section are restrictive of the general law-making power of the legislature. If it could be said that a freeholders' charter adopted by a vote of the people of a city under the express sanction of the constitution, is to be viewed as an enactment of the legislature, then there might be force in the point made. As a test of that matter it may be here inquired: What power has the legislature to mould or change a freeholders' charter when such an instrument is before it for consideration? The answer is that it has no such power. It is required that a freeholders' charter to become effective must be approved by the legislature; this approval is made by resolution and not by bill. It has been held that the legislature does not exercise law-making power when it approves such charters. (*People v. Toal*, 85 Cal. 333, [24 Pac. 603]; *People v. Gunn*, 85 Cal. 238, [24 Pac. 718].) In *Ex parte Sparks*, 120 Cal. 395, [52 Pac. 715], Justice Temple in the main opinion, declared that because amendments to the constitution, adopted subsequent to the rendering of the decisions in *People v. Gunn* and *People v. Toal*,

provided that when the approval of the legislature is given to a freeholders' charter, it "may be by concurrent resolution," the force of the conclusions announced in the cases cited was weakened and that the question as to whether the legislature when so acting exercised law-making power should be considered an open one. This view was concurred in by only one other justice of the court, the two remaining justices who concurred in the judgment refusing to agree to that declaration. If the decisions in the Gunn and Toal cases correctly declared the law under a constitutional provision which required the legislature to approve or reject a freeholders' charter without power of amendment, and which did not provide how that approval should be manifested, whether by bill or resolution, it is indeed difficult to perceive any reason why the effect of these decisions is impaired in the least by subsequently adopted constitutional amendments which contain the express declaration that the approval may be by concurrent resolution. It would seem that approval by bill, which is the method prescribed for the enactment of laws in this state (Cal. Const., art. IV, sec. 15), would be inappropriate under either provisions of the constitution. A bill is ordinarily subject to amendment as it passes through the two legislative houses, but the legislature possesses no power to change or modify a charter adopted by the people of a municipality. The electors through their board of freeholders, determine upon the provisions of the law under which they propose to be governed; the legislature merely assents, when its approval is given, that the municipality may be so governed. "The legislative power we understand to be the authority, under the constitution, to make laws, and to alter and repeal them." (Cooley on Constitutional Limitations, 7th ed., p. 131.) In the case of *State v. Dahl*, 6 N. D. 81, [34 L. R. A. 97, 68 N. W. 418], it is said, referring to a joint resolution of the legislature: "The joint resolution has no title, its enacting clause is not couched in the language prescribed by the constitution to be employed in the enactment of ordinary laws; nor was it ever submitted to the governor for approval. Whenever it is necessary that the expression of sovereign will should take the form of ordinary legislation, these requirements must be strictly observed. . . . Under many state constitutions containing provisions

with regard to the enactment of statutes similar to those found in the organic law of this state, it has been, and is, customary to express by joint resolution the will of the legislature on matters not falling within the category of ordinary legislation." These citations are cumulative to the point that the legislature does not, when it approves by resolution a municipal charter, exercise law-making power in the sense intended to be expressed in the prohibitory clause of the constitution here claimed to have been violated. Municipalities are given the power to draft charters the provisions of which, in so far as they refer to municipal affairs, are superior to the general state laws. The legislature cannot enact any law which will repeal or change such charter provisions. This result has followed an amendment to the constitution adopted in 1896, before which time general statutes of the state were of superior force.

Appellant insists, however, that even though the charter provisions which created the board of water commissioners and its successor, violated no restrictive clauses of the constitution, yet that the language used in those provisions does not extend the power of the commission so far as to permit it to purchase ground and erect an administrative building for the uses of its department. The commission having charge of the city water department as created by the charter, constitutes an agency of the municipal government, but one possessed of independent functions; it is a legal entity. It serves as the managing and directing power of the utility which it has in charge and in its sphere of action is free from interference by the legislative body. It possesses the power and the sole power to authorize the expenditure of money derived from the sale of water, as its discretion may suggest, including the power to purchase additional lands and water-rights and other property necessary to the maintenance of the utility. It may sue and be sued alone and under its own name. Its organization and powers comport with the modern idea of a commission form of government where, instead of lodging all administrative authority under one general head, control is divided and separate departments transact with greater freedom of action and more extensive authority the business allotted to them. Under such a system the common council is relieved of many of its responsibilities, and like-

wise is shorn of much of its former power and becomes more especially a distinctive legislative body. Having seen over what a wide range the power of the commission extends, it can better be determined what means may be permitted to it through which to perform the duties assigned to it. It is required that the board shall maintain an office and prescribe office hours for the convenience of the public; also that it shall hold regular stated meetings once each week. It is nowhere required that the city council shall provide this office for the board of commissioners, nor that that office shall be at the city hall. If then, as is clear, the board is authorized to maintain its own office, how can it be said that such an office may not be obtained by purchase or erected by contract? If one can legally be purchased or erected, what is there in the charter provisions which limits the expenditure of money in that direction? Certainly no limit can be set to that power, except such as the discretion of the board reasonably exercised may dictate. It is not shown by any allegation in the complaint in this action that the commission in proceeding to purchase ground and arrange for the construction of a building was chargeable with improper motives or bad faith, and there it would seem that the discussion upon this particular contention must end.

Section 18 of article XI of the constitution, which forbids a city, etc., from incurring any indebtedness exceeding in any one year the income and revenue provided in such year without the favorable vote of two-thirds of the electors, is not applicable. The prohibition in this section provided does not extend to a board of commissioners exercising functions under the charter of a city, such as appears here. It is a sufficient answer to this contention to note that such a board is not named or described in the section of the constitution which is invoked. (See *In re Madera Irrigation Dist.*, 92 Cal. 296, [27 Am. St. Rep. 106, 14 L. R. A. 755, 28 Pac. 272, 675]; *Robertson v. Board of Library Trustees*, 136 Cal. 403, [69 Pac. 88].) Furthermore, the money used and proposed to be used in the purchase of the lot of ground and the erection of the building was not to be taken from the ordinary revenues of the city, and to that extent it may be said that the city's credit was not involved in the incurring of the indebtedness.

Appellant presents no other points for consideration, and from the conclusions expressed as to the propositions discussed it follows that the judgment appealed from should be affirmed. It is so ordered.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 24, 1914.

[Civ. No. 1399. Second Appellate District.—December 27, 1913.]

FERROCHEM COMPANY OF PENNSYLVANIA (a Corporation), Appellant, v. **MORRIS DANZIGER**, Respondent.

CORPORATION—SUBSCRIPTION AGREEMENT FOR STOCK IN PROPOSED COMPANY—ACTION TO RECOVER UNPAID BALANCE THEREON.—Where one enters into a subscription agreement with respect to a proposed corporation, agreeing to pay his subscription on demand of the board of directors, and accepts the stock and pays part of the subscription price, having knowledge that the corporation is not formed by the same persons who signed the subscription agreement, and admitting that the corporation thus formed is the one contemplated by the agreement, the corporation may recover from him the unpaid balance due on his stock, without pleading the subscription agreement as the basis for the action.

ID.—IRREGULARITY IN ISSUANCE OF STOCK CERTIFICATE—WHETHER DEFENSE TO ACTION ON SUBSCRIPTION.—The defendant in such action is not excused from paying for his shares of stock, as required by the contract, because the certificate issued to him does not comply with the requirements of section 323 of the Civil Code.

APPEAL from a judgment of the Superior Court of Los Angeles County. E. P. Unangst, Judge presiding.

The facts are stated in the opinion of the court.

H. C. Millsap, and F. E. Davis, for Appellant.

J. M. Danziger, and Walter E. Burke, for Respondent.

CONREY, P. J.—The complaint alleges that the defendant is indebted to the plaintiff in the sum of six hundred dollars, balance due upon an account for one thousand shares of the capital stock of plaintiff company, sold and delivered by plaintiff to defendant at defendant's special instance and request; that defendant agreed to pay for said property so delivered the sum of one thousand dollars, no part of which has been paid, save and except the sum of four hundred dollars. The answer and the cross-complaint of the defendant stated some affirmative matters which will be disregarded, as the defendant did not introduce any evidence at the trial of the case. The answer contains denials of all of the allegations of the complaint, except these: That defendant does not deny that the stock was delivered to defendant, nor that he agreed to pay therefor one thousand dollars, nor that he has paid four hundred dollars and no more.

The evidence introduced by plaintiff shows that the plaintiff was incorporated on August 12, 1911; that in July, 1911, the defendant and thirteen others entered into mutual subscription agreement with respect to the proposed corporation, and therein the defendant agreed to pay for his stock, on demand and on call of the board of directors, certain sums amounting to said sum of one thousand dollars; and agreed that his subscription, like that of the others, was made for the use and benefit of said company and might be enforced by said corporation. The corporation having been duly organized and said first forty per cent of the stock subscription having been paid, one thousand shares of the stock were delivered to and accepted by the defendant. Afterward, the corporation having called for the remaining sixty per cent, made demand on the defendant for the remaining six hundred dollars provided for in his agreement, and on his failure to make such payment brought this action to recover the amount alleged to be due.

Upon the facts thus shown, the court rendered judgment in favor of the defendant. The court found that the defendant did not become indebted to the plaintiff for any balance due upon an account for shares of stock of plaintiff corporation; that plaintiff did not sell and deliver to the defendant, at defendant's special instance and request at any time, one thousand shares of the capital stock of plaintiff; and that there

is not due, owing and unpaid from defendant to plaintiff the sum of six hundred dollars. In its bill of exceptions the plaintiff specifies that the evidence is insufficient to justify these findings. Respondent claims that the evidence showed an entirely different cause of action from that stated in the complaint, and that in order to recover under the subscription agreement it was necessary for the plaintiff to have pleaded the same as the basis of its action; also that plaintiff is not a corporation formed by the parties to said agreement. The case of *Marysville Electric Light etc. Co. v. Johnson*, 93 Cal. 538, [27 Am. St. Rep. 215, 29 Pac. 126], cited by respondent, does not sustain his position here. In that case it was held that the corporation was entitled to recover upon the subscription agreement made prior to the forming of the corporation, such agreement having been intended by the parties to inure to the benefit of the corporation when formed. "Upon the formation of the plaintiff corporation by the persons signing the agreement, and plaintiff's acceptance of the agreement, the defendant became bound to take and pay for the number of shares subscribed for by him." The respondent in this present case appears to rely upon the fact that the Marysville Electric Light & Power Company in the case above cited was incorporated by the same set of individuals who signed the subscription agreement, whereas in the present case the articles of incorporation show that the plaintiff was formed by one of the signers to the subscription agreement, together with four others who were not such signers. And his counsel contends that the decision above noted includes the proposition that to entitle the corporation to recover upon such subscription agreement, the corporation must be formed by the very persons who signed the agreement. This argument could be applied with some force if the defendant here had not admitted that the corporation thus formed was the corporation contemplated by his agreement, and if he had not accepted his stock with full knowledge of the facts. The evidence shows without contradiction that the defendant was present at the directors' meeting of the corporation at which the subscription agreement was accepted by the company, and therefore that with presumably complete knowledge of what there took place he received his certificate of stock and paid four hundred dol-

lars on account of the total sum agreed to be paid by him. In view of these facts, and the corporation having so issued the stock to defendant and having charged him on its books with the unpaid balance for which call was made, and which upon demand he refused to pay, we are of the opinion that these facts are sufficient to have created the indebtedness upon the contract substantially as stated in the complaint, and that the judgment should have been in favor of the plaintiff.

The fact is shown by the record, and discussed in the brief of respondent's counsel, that the stock certificate issued to the defendant does not comply with the requirements of section 323 of the Civil Code. This irregularity, in which the defendant and the plaintiff are equally at fault, applies merely to the certificate, and should not excuse the defendant from paying for his shares of stock as required by his contract.

The judgment is reversed.

James, J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 24, 1914.

[Civ. No. 1121. Third Appellate District.—December 27, 1913.]

HENRY DANNENBRINK et al., Appellants, v. J. A. BURGER et al., Respondents.

WATERS AND WATERCOURSES—WATER SEEPING FROM DITCH OF APPROPRIATOR—SUBSEQUENT APPROPRIATION BY OTHERS.—A prior appropriator of water may not so repair or reconstruct his ditch, flumes, and dam as to prevent water seeping through them from discharging into the original stream from which the water was taken, after such discharge has continued uninterruptedly for a length of time sufficient to establish a prescriptive title thereto in one who has actually appropriated and continuously used such seepage water, after its return to the original stream, during all of such period.

ID.—AMOUNT OF WATER APPROPRIATED—HOW DETERMINABLE.—It is neither the capacity of the ditch, nor the amount originally appropriated, which determines the rights of an appropriator of the waters of a stream, but the amount which he puts to some beneficial use.

ID.—WATER ESCAPING FROM ARTIFICIAL WATERCOURSE—RIGHTS OF APPROPRIATOR THEREOF.—Where water escaping or leaking from an artificial watercourse goes to waste by flowing promiscuously over other lands, or finds its way to some other stream than the one from which it has been diverted, a person appropriating such water merely takes the *corpus* and not the usufruct therein, thereby leaving the owner of such ditch or artificial watercourse at liberty at any time to change or alter it without invading any vested right of the appropriator. But this rule does not apply where the escaped water has returned to the stream from which it was originally diverted, and has thereafter been appropriated by others than the original appropriator.

APPEAL from an order of the Superior Court of Trinity County refusing a new trial. Stanley A. Smith, Judge presiding.

The facts are stated in the opinion of the court.

H. R. Given, for Appellants.

J. D. Hall, and C. Wm. White, for Respondents.

HART, J.—This is a suit to quiet title to certain water-rights and to enjoin the defendants from claiming or asserting any claim to said water-rights and from interfering with the full enjoyment thereof by the plaintiffs.

The defendants were awarded judgment on the issues made by their answer to the complaint.

In due time the plaintiffs presented a motion for a new trial, which was denied, and this appeal is prosecuted by them from the order denying said motion.

The vital point upon which the decision of the controversy between the plaintiffs and the defendants must depend involves the question whether the latter were entitled to appropriate and thus acquire the right to use the waters which it is claimed have for many years seeped or percolated through a certain ditch, owned by the plaintiffs and their predecessors for over thirty years immediately prior to the commence-

ment of this action and whereby they utilized, principally for mining purposes, a large proportion of the waters of a stream known as Gwin gulch, in Trinity County.

Said gulch is a mountain stream and the quantity of water that it carries, like all ordinary mountain streams, varies according to the seasons of the year. In the winter time or the rainy season the flow of water in the gulch is large, while in the summer months or those months during which there is little, if any, rain, the flow of water naturally decreases so that the stream contains or carries during such periods a very small amount of water. The plaintiffs claim the right, by appropriation, to take and use twelve hundred inches of water from said gulch by means of three ditches, named and known as the "Waste Ditch," the "Eagle Ditch," and the "Empire Ditch."

The complaint alleges that "the said ditches and the water-rights appurtenant thereto have been more than thirty years last past and now are appurtenant to that certain group of mining claims situated in said Cañon Creek Mining District, commonly known as the Dannenbrink group of mines, and for all of said period have been used on said mining properties for a useful and beneficial purpose; that said defendants claim some other right to said ditches and water-right from said Gwin gulch as against the plaintiffs herein, which said claim is without any right whatever and is adverse to plaintiffs; that the defendants have no right or interest in said waters of Gwin gulch or said above-named ditches or any part or portion thereof."

The defendants, in their answer, admit the plaintiffs' ownership and possession of the Waste ditch, and that the plaintiffs were the owners of an undivided one-half interest in and to the Empire ditch, and were, with their co-owners, not parties to this action, the owners of and entitled to three hundred inches of water of the "first flow" of said Gwin gulch diverted by and through said Empire ditch. It is alleged in the answer that said Eagle ditch "is now and for more than five years last past has been abandoned and unused and no water has been diverted by or through said ditch by plaintiffs or any other person or persons for more than five years immediately preceding the commencement of this action." The defendants further allege and claim that they

are the owners of and entitled to seventy-two inches of the "second flow" of the waters of Gwin gulch, appurtenant to two ditches of which they are the owners, viz.: the "Slack" ditch and the "Peek" ditch, the first mentioned of said ditches being located and connected with Gwin gulch about nine hundred and sixty feet below the intake of the Waste ditch and the Peek ditch about fifteen hundred feet below the intake of said Waste ditch. The answer then alleges that the seventy-two inches of water (measured under a four-inch pressure) which they have the right to use and divert from said Gwin gulch, as above stated, are so conveyed to the lands and premises of the defendants, "situated in the Cañon Creek Mining District, Trinity County," and described as "lot 40, embracing a portion of township 24 north, range 11 west, M. D. M., and other lands adjacent thereto"; that the waters so diverted by the defendants from Gwin gulch and used upon their said land "have been for over thirty years last past and now are being used by defendants for irrigation, domestic, mining and other useful purposes upon said premises above described, subject only to the prior right of plaintiffs and their co-owners to take and divert 300 inches of said Gwin gulch, measured under a four-inch pressure, by and through said Empire ditch." It is admitted by the defendants that the plaintiffs "are the owners of and entitled to the third right to use and divert from said Gwin gulch 800 inches of water measured under a four-inch pressure diverted by and through said Waste ditch."

The court found that the defendants were and are the owners of the Slack and Peek ditches, whereby water from Gwin gulch was conveyed to their premises, above described; that the right to the waters of Gwin gulch, owned by the plaintiffs herein, and appurtenant to said Waste ditch, is older than and superior to the right or interest of the defendants in and to any waters of said Gwin gulch, "and the only right defendants have to the waters of the said Gwin gulch is to such waters as have seeped or percolated or flowed through or over plaintiffs' dam at the head of said Waste ditch, augmented by the drainage waters of the basin tributary to said Gwin gulch below the dam or intake at the head of said Waste ditch, both classes of waters not exceeding at any time in the year seventy-two inches of water,

measured under a four-inch pressure; that the water seeping or percolating through or over plaintiffs' dam at the head of said Waste ditch amounts to ten per cent of the amount of water flowing down said Gwin gulch to said Waste ditch dam, after plaintiffs and their co-owners have taken and diverted three hundred inches of the first flow of the waters of said Gwin gulch, measured under a four-inch pressure, by and through said Empire ditch"; that the defendants are the owners of and entitled to the right to use at all times of each year, subject to the rights of the plaintiffs as defined in the foregoing finding, said ten per cent of said waters, "provided that said ten per cent of said waters of Gwin gulch, together with the waters coming into said Gwin gulch below said Waste ditch dam shall not exceed at any time in any year seventy-two inches of water, measured under a four-inch pressure"; that the plaintiffs, after they and their co-owners have taken and diverted three hundred inches of the waters of said Gwin gulch measured under a four-inch pressure, by and through the said Empire ditch, are the owners of and entitled to the right to use at all times of each year ninety per cent of the waters of said gulch flowing to the head dam or intake of the Waste ditch; provided that said ninety per cent of said waters of said gulch shall not exceed at any time in any year nine hundred inches of water, measured under a four-inch pressure, exclusive of the water-right appurtenant to said Empire ditch; that said ten per cent of said waters, together with the waters coming into said gulch below the Waste dam, have been, for more than thirty years and now are, used by the defendants and their grantors and predecessors in interest for irrigation, domestic, mining and other useful purposes upon the premises of defendants above referred to and described; that the defendants have no right or interest in the waters of said gulch other than that specified in the foregoing findings.

The evidence shows that the Waste ditch was constructed in the year 1863, and that during all the time since then the plaintiffs and their predecessors have continuously used said ditch and by means thereof obtained a portion of the water from Gwin gulch owned by them and necessary for their purposes. The evidence further discloses that the Peek and Slack ditches, whereby the defendants and their predecessors

in interest conveyed water from Gwin gulch to and upon their premises, were constructed at a later period, the last-named ditch having been built in the year 1868, and the other at about the same time. It further appears from the evidence that, from the time that the Slack and Peek ditches were built and put to use, the dam and flume of the Waste ditch were in such condition as that a small proportion of the water taken into said ditch from Gwin gulch percolated or seeped through said flume and through and under said dam and again found its way to the channel of the gulch. It was this seepage water, with the drainage waters of the basin tributary to said Gwin gulch below the dam or intake at the head of said Waste ditch, which the defendants and their predecessors had appropriated and continuously used for their purposes for a period of about twenty-five years and until the year 1907. In the year just mentioned, the plaintiffs, as the evidence shows, removed the flume, tightened the ditch so that it would no longer admit of the loss by seepage of any of the waters taken into it, and installed a new dam, impermeable or watertight, in the place of the old dam, which was built in part of logs and loosely constructed, and which had for fully twenty-five years been maintained in connection with the said ditch. These changes in the dam and ditch resulted, of course, in preventing water from said ditch returning, in any perceptible degree, to the gulch, and thus causing the defendants to be deprived of sufficient water from said stream to supply their needs. Although the plaintiffs claim that but an insignificant amount of water at any time returned from said ditch to the original stream in the summer time, they admit that, as to the extent of the leakage, the testimony is conflicting. And, in this connection, it may be stated that the plaintiffs contend that on occasions when more than a mere trace of water returned to the original stream from said ditch through leakage it was due to the punching of holes in the flume or dam by the defendants or their predecessors, and that but for such "punching process," as it is characterized by counsel for the plaintiffs, the quantity of water seeping from the Waste ditch and returning to the gulch would not at any time have been of any material consequence; but upon that question the evidence is also conflicting, and, therefore, the implied finding of the

trial court adversely to the contention of the plaintiffs with respect thereto is binding upon this court.

We have not regarded it necessary to enter into a detailed statement and examination of the evidence in this opinion, it being sufficient, in our opinion, briefly to present, as we have in the foregoing statement, the important facts brought out at the trial and as found by the court. It is conceived that the findings of the trial court that the defendants are entitled to certain waters of Gwin gulch, including those waters which have for many years percolated through and under the Waste ditch and dam, are well supported by the evidence. There remains, therefore, but one question to be determined by this court. This question is thus stated by the plaintiffs: "Whether or not a prior appropriator has, at any time, the right to tighten his dam, flumes and ditch so that there shall be no leakage therefrom," the argument being that the evidence adduced at the trial of the present case goes no further than to show that the plaintiffs, in repairing their ditch and its appurtenances, performed an act which resulted only in the conservation of the amount of the waters of Gwin gulch originally appropriated by them and which are and were at all times necessary for their legitimate purposes.

But it is conceived that the question submitted here is much broader than as stated by counsel for the plaintiffs. It cannot, of course, be questioned that an appropriator may at all times keep his ditch and its essential equipments in such repair as will preserve to him all the waters he has rightfully appropriated and which are required for the legitimate or beneficial purposes to which he applies them. The question presented for solution on this appeal, however, is not whether he may repair his ditches, flumes, and dams or maintain them in proper condition for the purpose of conserving the full measure of water to which he is lawfully entitled by virtue of his appropriation, but whether, as a prior appropriator he may so change or reconstruct his ditch, flumes, and dam as to prevent waters seeping through his ditch from discharging into the original stream from which they were thus taken, after such discharge of such waters has continued uninterruptedly for a period of time sufficient to establish a prescriptive title thereto in one who had actually appropriated and continuously used such seepage waters

during all of such period of time. The question thus propounded must, upon sound and well-settled principles, be answered in the negative.

Section 1411 of the Civil Code provides that the appropriation of water must be for some useful or beneficial purpose, "and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases." So, in this case, assuming that the plaintiffs and their predecessors had originally appropriated and used all the waters of Gwin gulch under their appropriation, it is clear from the findings that, by permitting a certain quantity of the waters so appropriated to seep through their ditch and return to the gulch and, therefore, to remain unused by them, their right to such percolating waters ceased and became subject to appropriation by subsequent appropriators and the right of the latter to continue in the unmolested use of the same, provided that such waters were not recaptured or reclaimed by the plaintiffs within the period beyond which their right thereto would be barred for nonuser. It is a well settled proposition that it is neither the capacity of the ditch, nor the amount originally appropriated, which determines the rights of an appropriator of the waters of a stream (*Smith v. Hawkins*, 120 Cal. 86, [52 Pac. 139]; *Senior v. Anderson*, 115 Cal. 496, [47 Pac. 454]), and, as the first mentioned of the cases just cited well says, "If plaintiffs could forfeit their entire right of appropriation by nonuser, equally will they be held to forfeit less than the whole by like failure. . . . No matter," continues the opinion in that case, "how great in extent the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser." In other words, as is said in *Duckworth v. Watsonville Water & Light Co.*, 150 Cal. 521, [89 Pac. 338, 1 Water & Min. Cas. 140], "an appropriator is entitled only to the water actually taken and used." And it may be observed that it is further said in that case that "a prior appropriator is not entitled to prevent an appropriation or use by others of the surplus of the waters of the lake, if there is any," and this principle applies with equal propriety, we think, to waters seeping from

a ditch and again returning either to the main stream itself or its tributaries, in which case, as is said by the supreme court of Colorado, in *Water Supply & Storage Co. v. Larimer & Weld Reservoir Co.*, 25 Colo. 87, [53 Pac. 386], such waters "become a part of the waters of the stream the same as though never diverted, and inure to the benefit of appropriators in the order of their appropriation."

From the fact that the plaintiffs in the present case and their predecessors in interest suffered the seepages from their ditch to be discharged in the gulch continuously for twenty-five years prior to the time at which they repaired or reconstructed their ditch and dam in the year 1907, the conclusion is manifestly inevitable that the waters so returned to said stream were, during that period, not only not applied by them to a beneficial or useful purpose, but were not required or necessary for the purposes for which they appropriated waters from Gwin gulch. It follows that the waters so escaping from the Waste ditch and again returning to the stream from which they were diverted into said ditch became *publici juris*, and were, therefore, open to appropriation, diversion, and a beneficial use by others, and having been appropriated and for about twenty-five years used and applied by the defendants to a beneficial purpose, they thus acquired a vested right or usufruct therein of which they cannot now justly be divested by the plaintiffs. As before stated, a prior appropriator undoubtedly has the right to keep his ditches and their necessary concomitants in such repair as will enable them fully to perform or accomplish the legitimate purposes for which they were constructed, or he may change the point of diversion, but this rule is subject to the qualification that a subsequent appropriator has a vested right, as against his seniors, to require a continuance of the conditions existing at the time he made his appropriation, and if any changes made in the ditch by the senior, either as to the place of diversion or otherwise, have the effect of altering those conditions, to the prejudice of a subsequent appropriator, the latter has just and legal cause to complain. (See *Handy Ditch Co. v. Loudon Irr. Canal Co.*, 27 Colo. 515, [62 Pac. 847, 848], and cases cited in said opinion.)

The cases cited by counsel for the plaintiffs in an attempt to establish the proposition that waters escaping from the

ditch of a prior appropriator and discharging into the stream from which they are so taken at a point below the place of such diversion may not be appropriated by others for a useful purpose, or that an usufruct therein cannot be acquired by subsequent appropriators, are not applicable to the facts as found by the court in the case before us. We cannot, nor is it necessary specially to review all those authorities. It is deemed sufficient to say that they are cases which deal either with the question whether a person can acquire a vested right or usufruct in waters escaping from or seeping through the banks of an artificial watercourse and discharging into another stream than that from which it is so diverted or going to waste, or with the question whether one may acquire a prescriptive title to riparian waters by adverse user or by estoppel by matters *in pais* under certain circumstances. As to the first of the propositions thus stated, and which involves the sole question submitted for decision in some of the cases referred to by the plaintiffs, it is to be remarked that it is well settled that where water escaping or leaking from an artificial watercourse goes to waste by flowing promiscuously over other lands or finds its way to some other stream than the one from which it is diverted into such artificial watercourse, a person appropriating such water thus merely takes the *corpus* and not the usufruct therein. In such case, having the usufructuary right in such water, the owner of such ditch or artificial watercourse is at liberty at any time to change or alter it without invading any vested right of the appropriator, even though the effect of such change or alteration must inevitably result in depriving the appropriator of the water escaping from such watercourse and which he has appropriated and used, perhaps for a long period of time. As is said in *Hanson v. McCue*, 42 Cal. 303, [10 Am. Rep. 299], and approved in *Katz v. Walkinshaw*, 141 Cal. 116, [99 Am. St. Rep. 35, 64 L. R. A. 236, 70 Pac. 663, 74 Pac. 766], the owner of an artificial watercourse is not bound to maintain the artificial stream for the benefit of those who have appropriated waters escaping therefrom. And, as was said by Baron Parke, in *Arkwright v. Gell*, 5 Mees. & W. 226, wherein the right to the use of appropriated water pumped from a mine and run off in a ditch, "the lower claimant who received and put to use this water would only

have a right to use it, for any purpose to which it was applicable, so long as it continued there. Time would raise no presumption of a grant nor found any claim to a continuance of the discharge; for the mine owner could not bring any action against the person using the water, so as to make him stop using it; and consequently such use did not in any way concern or bind the mine owner. We, therefore, think that the plaintiffs never acquired any right to have the stream of water continued in its former channel." In other words, the appropriator merely secures the *corpus* of the water thus escaping as personalty, but does not thereby secure or acquire the right to the continuous flow of such water. This whole question is clearly and fully treated in Weil on Water-rights, 3d ed., sections 51 to 63, inclusive, wherein the author makes a clear statement of the distinction which is recognized between the case of the discharge of seeping water from an artificial watercourse into a place other than the stream from which it is diverted and the case of the return of such water to the stream itself from which the original diversion is made.

As to the cases cited by counsel, treating of riparian rights and the question of how such rights may or may not be divested by prescription or otherwise, it is to be said that, while some of them discuss many of the principles governing such rights and how they may be lost, in none of them is there anything which supports the proposition that a prior appropriator may so change his means of diversion as will have the effect of giving to him more water than he had theretofore habitually taken, where, by such change, he deprives a junior appropriator of a right which he has acquired in the waters of the stream. There is, however, no question of riparian rights involved in this controversy, and the cases last referred to shed little light on the question now before us.

Our conclusion is, as before stated, that the findings are sufficiently supported to render them immune from successful attack, and that the court's conclusions of law therefrom are sound. The defendants were awarded a very small proportion of the waters of Gwin gulch, and, as it is clear from the proofs that they have been and are using said waters for a necessary and beneficial purpose, viz.: the irrigation of

their vineyards, vegetable gardens, and land devoted by them to alfalfa growing, as well as for domestic or household purposes, we think the decree involves a just and equitable adjustment of the respective rights of the parties.

The order is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 24, 1914.

[Civ. No. 1281. First Appellate District.—December 30, 1913.]

STEFANO VENTRE, Respondent, v. ANTONIO TISCORNIA et al., Defendants, ANTONIO TISCORNIA, Defendant and Appellant.

PARTITION—IMPROVEMENTS IN LEVELING AND BULKHEADING LAND—

FINDINGS CONTRARY TO EVIDENCE.—In this action for partition of a tract of land wherein the defendant, by way of cross-complaint, sought judgment against the plaintiff for money expended in improving and preserving the common property by leveling and bulkheading it, the findings fixing the cost of such improvements and refusing to allow the defendant anything therefor, are contrary to the evidence, which is not conflicting either as to the necessity for the improvements or their cost.

ID.—IMPROVEMENTS WITHOUT CONSENT OF COTENANT—LIABILITY TO CONTRIBUTION.—If in such case the improvements were necessary and the plaintiff shared in the benefits thereof, he is chargeable with his proportion of their cost, though they were made without his consent, express or implied.

ID.—EQUITABLE CONSIDERATIONS IN ACTION FOR PARTITION—ALLOWANCE FOR IMPROVEMENTS.—A cotenant, seeking partition of the common property at the hands of a court of equity, will be granted relief only upon the condition that the equitable rights of his co-owner will be respected and protected. Therefore where one tenant in common has, in good faith, with or without the consent of his cotenant, expended money in making permanent improvements which were necessary to the preservation of the common property, partition should not be decreed without first counting the cost of such improvements and making a suitable allowance for them.

ID.—NECESSITY OF IMPROVEMENTS—SHARING IN BENEFITS—ELECTION BY COTENANT.—If, as appears to be true, the evidence in the present case shows without conflict that the improvements to the common property were necessary to its preservation and enhanced its rental value, then the plaintiff should have been put to his election either to contribute equally to the undisputed cost of the improvements, or else relinquish all claim to a share of the increased rentals resulting therefrom.

ID.—RELATION OF LANDLORD AND TENANT—TENANT AT WILL.—The finding of the lower court in this case, relating to the necessity and cost of the improvements in question, cannot be justified upon the theory that the improvements were made by the defendant in the character of an ordinary tenant at will of the plaintiff. The case was not tried, either in whole or in part, upon the theory that the relation of landlord and tenant existed between the parties to the partition; but was heard and determined solely upon the issue of the relative rights of the parties as tenants in common.

APPEALS from an interlocutory decree in partition of the Superior Court of the City and County of San Francisco, and from an order refusing a new trial. E. N. Rector, Judge presiding.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto, for Appellant.

Sullivan & Sullivan and Theo. J. Roche, for Respondent.

LENNON, P. J.—These are appeals from an interlocutory decree and from an order denying a new trial in an action for the partition of real property, in which the plaintiff and the defendant Tiscornia as tenants in common claim an undivided interest.

The defendant Tiscornia answered, and joined in the plaintiff's prayer that the property be partitioned in accordance with their respective interests, but by way of cross-complaint claimed that he had expended certain sums of money in the preservation and improvement of the common property, for which sums he sought judgment against the plaintiff as an incident of the partition.

The plaintiff answered, and denied the allegations of the cross-complaint concerning the claim for moneys expended in the preservation and improvement of the property; and

in that behalf, after pleading the statute of limitations against such claim, alleged that whatever moneys said defendant had expended in or about the land sought to be partitioned were expended by him for his individual use and benefit and not for the common benefit of plaintiff and said defendant.

The undisputed facts of the case as disclosed by the evidence are these: The land in controversy, consisting of some twelve or thirteen acres, was originally purchased by the plaintiff and defendant Tiscornia as tenants in common, and occupied by them as copartners in the business of raising vegetables for the market. Upon the dissolution of the partnership and for several years thereafter Tiscornia used and occupied the entire premises, maintaining thereon a truck garden, for which use and occupation he paid to the plaintiff the sum of twenty-five dollars per month. Finally the plaintiff and Tiscornia joined in a ten years' lease to the defendant Lou Hoy of several acres of the common property for the total rental of seven thousand two hundred dollars, payable at the rate of sixty dollars per month. Tiscornia, during the time he was in the exclusive use and occupation of the common property, made certain permanent improvements thereon, which consisted in part of leveling the acreage leased to the defendant Lou Hoy, and erecting and maintaining a fence in the nature of a bulkhead some two thousand feet in length for the purpose of preventing the storm waters of severe winters from washing away and thereby rendering valueless a considerable portion of the property. The leased land prior to the leveling was unimproved and yielded no profit in rent or otherwise. The plaintiff contributed nothing toward the expense of this improvement and preservation of the common property, but afterward claimed and received one-half of the increased income. It was an admitted fact in the case that Tiscornia, for the use and occupation of that portion of the common property remaining in his exclusive possession after the execution of the lease to the defendant Lou Hoy, was indebted to the plaintiff in the sum of one hundred and fifty dollars, and that at the time of the commencement of the action there was due and unpaid to the plaintiff, as his share of the rent reserved

under the lease, the sum of three hundred dollars which had been collected and retained by Tiscornia.

The foregoing facts being undisputed or admitted, and the title and interests of the respective parties, together with the necessity for partition, being conceded, the only controversy which developed upon the trial related solely to the question as to whether or not the improvements and preservation of the property as made by Tiscornia were for the common benefit, and worth the sum claimed to have been expended by him for that purpose.

The trial court, upon the issue relating to the improvement and preservation of the property, found that Tiscornia had expended one hundred dollars in leveling the leased portion of the land, but found against him in so far as the construction and cost of the fence or bulkhead were concerned; and after deducting one-half of the cost of leveling from the sum admittedly due to plaintiff, judgment was entered in his favor for the sum of four hundred dollars.

Upon this phase of the case we think the findings are clearly contrary to the evidence. It will be remembered, as previously pointed out, that it was not disputed that Tiscornia had leveled the leased portion of the land and erected the bulkhead. His testimony as to the necessity for and the approximate cost of these improvements is substantially as follows: Within ten years preceding the commencement of the action he had leveled from time to time four or five acres of the partitioned property. Such leveling was necessary to prevent small streams of flood waters, having their sources in a creek which ran through the property, from carrying away the soil. Without leveling, this particular piece of property was not rentable, but as a consequence of the leveling it was leased to the defendant Lou Hoy for a term of ten years at the monthly rental of sixty dollars, thereby and to that extent increasing the rental value of the entire tract. The leveling occupied about three months' time in all, and cost approximately five hundred dollars. A year or two after the dissolution of the copartnership the construction of the bulkhead was commenced, and was continued piecemeal from time to time until completed. It was three or four feet high, two thousand feet in length, and cost approximately one thousand dollars. In its construction some five hundred dollars'

worth of material was used, and the services of from seven to nine men, laborers and carpenters, were needed and employed at odd times, some of whom were paid four and one-half dollars per day and found, and others at the rate of from thirty dollars to fifty dollars per month. The bulkhead was necessary to protect the greater part of the entire tract from being inundated and partially washed away by the storm waters from wet winters.

Plaintiff contends that the findings fixing the cost of leveling the leased land and refusing to allow anything for the construction of the bulkhead, are justified and should be sustained because of a claimed conflict in the evidence, and the asserted inherent improbability of Tiscornia's testimony.

We fail to find, after a careful scrutiny of the record, a substantial or any conflict in the evidence either as to the necessity for the improvements mentioned or their cost; and we are not convinced that the testimony of Tiscornia, standing as it does uncontradicted and unimpeached, was rightly ignored by the lower court in making up its findings.

The plaintiff was a witness in his own behalf, and his defense to the claim for contribution to the expenses of improving and preserving the common property was practically rested upon his testimony alone. As a witness he did not deny that, in order to successfully cultivate the leased land, it was necessary to divert several small streams which overflowed from the creek; nor did he deny that the leveling done by Tiscornia accomplished this result. Neither did he deny that such leveling was the proximate cause of the lease to the defendant Lou Hoy, and also of a material enhancing of the rental value of the entire property. True the plaintiff did testify that "the leveling was done to plant vegetables," and that "it was not necessary to prepare the land to do any leveling." This, however, was not in contradiction of anything testified to by Tiscornia. The latter did not claim that the leased land needed preparation by leveling or otherwise to make it productive. His testimony rather was to the effect that without leveling the overflow from the creek would render the cultivation of vegetables unprofitable if not impracticable; and therefore it may be fairly said that he and the plaintiff were in substantial accord as to the reason and necessity for leveling. The claim of Tiscornia that a fence

or bulkhead was necessary to preserve the property from the ravages of storm waters was not even attempted to be disputed, but, to the contrary, was in a measure corroborated rather than contradicted by the evidence of the plaintiff, who testified that the bulkhead in controversy was the continuation of a fence which had been erected by both parties previous to the dissolution of the copartnership for the purpose of protecting the vegetables from the wash of the waters of the creek, which at times arose to the height of the fence.

It will thus be seen that there is no conflict in the evidence relating to the question of the necessity for the improvement and preservation of the common property by leveling and bulkheading.

With reference to the cost of these improvements the plaintiff merely testified: "If I had five men I could do the leveling in a week, and if seven or eight men worked continuously it would take less than a week to build the fence."

This testimony constitutes the sole basis for the claimed conflict in the evidence concerning the cost of improving and preserving the property; but we are at a loss to perceive how such testimony can be fairly said to controvert Tiscornia's testimony that he had expended five hundred dollars in leveling the land, and one thousand dollars in the construction of the bulkhead. The plaintiff did not deny that these sums were so expended, nor did he otherwise attempt to show the contrary. He merely ventured the assertion that he could have completed the leveling and constructed the bulkhead in considerably less time than did Tiscornia. Plaintiff did not say, however, by what method the work could be done in so short a time; nor did he pretend to know what the cost would be for the labor in one instance, and for labor and material in the other. Surely such testimony cannot be deemed to be satisfactory evidence, which alone will justify a decision. (Code Civ. Proc., sec. 1835.) It did not disprove or tend to disprove the testimony of Tiscornia that from time to time the sums mentioned were necessarily expended by him in the manner and for the purpose stated. Such facts were all of an open and notorious character which could have been readily disproved if false; and the failure of the plaintiff to produce any evidence to the contrary must be taken as

confirmatory of Tiscornia's testimony. (*Cavanaugh v. Wholey*, 143 Cal. 164, [76 Pac. 979].)

In short, the claimed conflict in the evidence on this phase of the case rests solely upon a mere general assertion of the plaintiff which does not, either expressly or impliedly, purport to meet and overcome the detailed and positive declarations of Tiscornia. Such a situation does not create a material conflict of evidence, within the meaning of the settled rule, which will support a finding claimed to be based thereon. (*Field v. Shorb*, 99 Cal. 661, [34 Pac. 504]; *Savings & L. Soc. v. Burnett*, 106 Cal. 514, [39 Pac. 922].)

From the view which we have taken of the evidence upon the whole case it follows that the findings of the lower court upon the issue immediately under discussion cannot be sustained unless it can be said as a matter of law that the plaintiff cannot be charged with and compelled to contribute ratably to the cost of improvements which, notwithstanding his participation in the resulting benefits and profits, he contends were neither necessary nor made with his consent.

This particular phase of the case has been elaborately briefed by the respective counsel for the parties to the appeal; but we do not deem it necessary to follow in this opinion every turn and angle of the argument. It will suffice to state that our conclusions and the reasons therefor are deduced from a consideration of the numerous authorities pro and con which have been cited to us.

The necessity for the improvements, as has already been shown, was established by the uncontradicted testimony of Tiscornia. The plaintiff admittedly shared in the increased rentals resulting therefrom, and therefore, we think, was chargeable with his share of the cost of the improvements, even though it be assumed that the evidence shows they were made without his consent, express or implied. While at common law a tenant in common could not claim contribution in an action at law for necessary improvements made upon the common property without the consent of a cotenant, nevertheless, inasmuch as an action for partition was essentially equitable in its nature, a court of equity was required to take improvements into account when decreeing partition, and to award to the cotenant in possession who had necessarily and in good faith improved the common property and enhanced

its value at his own cost, such equitable compensation as would leave only the value of the estate without the improvements to be divided among the tenants in common. This relief was granted in actions in partition in keeping with the familiar principle of equity jurisprudence which requires that one who seeks equity must do equity. The rule in this behalf has been adopted and applied with but rare exceptions in every jurisdiction where the action for partition is considered as one calling for equitable interposition and relief. Therefore it may be safely said that the rule of to-day, generally accepted and settled by a host of harmonious authorities, is that a cotenant, seeking partition of the common property at the hands of a court of equity, will be granted relief only upon the condition that the equitable rights of his cotenant will be respected and protected. Accordingly it has been uniformly held that where it is shown that one cotenant in common has, in good faith, with or without the consent of his cotenant, expended money in making permanent improvements which were necessary to the preservation of the common property, partition should not be decreed without first counting the cost of such improvements and making a suitable allowance for the same.

There are no reported decisions of the court of last resort in this state which assert a contrary rule; and there is practically no conflict of authority in other jurisdictions upon the proposition. The equitable rule and the reason for it, as declared here, are stated in one form or another in the numerous authorities dealing, generally and specifically, with the subject, which have been collected and reviewed in note C to the case of *Ward v. Ward*, 29 L. R. A., 452.

The cases relied upon to support the contention of the plaintiff are in some instances clearly contrary to the pronounced weight of authority; and in other instances are readily distinguishable from the case at bar in that they were actions at law in *assumpsit* by a cotenant for the cost of improvements; or, when the action was in partition it was shown that the improvements were not necessary and permanent; or were cases in which the cotenant did not share in the benefits resulting from the improvements. This being so, the cases referred to cannot be considered as having any application to the facts of the present case.

If, as we think, the evidence in the present case shows without conflict that the improvements to the common property were necessary to its preservation and enhanced its rental value, then the plaintiff should have been put to his election either to contribute equally to the undisputed cost of the improvements, or else relinquish all claim to a share of the increased rentals resulting therefrom. (*Rathbun v. Colton*, 15 Pick. (Mass.) 471.)

The finding of the lower court relating to the necessity and cost of the improvements in question cannot be justified upon the theory that such improvements were made by Tiscornia in the character of an ordinary tenant at will of the plaintiff. Undoubtedly tenants in common are privileged to create by contract, express or implied, the relation of landlord and tenant between themselves (*Jones on Landlord and Tenant*, sec. 28); and it is true that if, in addition to being tenants in common, the relation of the parties to partition is in fact that of landlord and tenant, no improvement of all or any part of the common property made by the cotenant in possession in the character of an ordinary tenant, and solely for the purpose of enabling him to promote an individual enterprise which he is conducting upon the premises, can, in the absence of a covenant covering the construction and cost of such improvements, constitute the basis of an enforceable claim for contribution upon partition. (*Cosgriff v. Foss*, 152 N. Y. 104, [57 Am. St. Rep. 500, 36 L. R. A. 753, 46 N. E. 307].) No such situation, however, confronts us in the case at bar. No issue concerning the existence of the relation of landlord and tenant was raised by the pleadings nor found upon by the lower court. The case was not tried, either in whole or in part, upon the theory that the relation of landlord and tenant existed between the parties to the partition; but was heard and determined solely upon the issue of the relative rights of the parties as tenants in common. That this is so is manifested by the findings and judgment allowing Tiscornia one hundred dollars for leveling a portion of the common property. Clearly the finding in this particular, when read and construed in conjunction with the pleadings and the evidence, was based solely upon the theory that Tiscornia, as the cotenant in possession, had made a necessary improvement of the common property which enured to the

joint benefit of both parties as tenants in common. It is equally clear from a consideration of the pleadings and proof that the superior court found against Tiscornia upon the issue relating to the bulkheading of the common property, not because it was done by Tiscornia as an ordinary tenant from month to month for his individual use and benefit, but solely upon the theory that such improvement was not necessary to the preservation of the common property and was made without the consent of the plaintiff.

The evidence, however, as has been previously pointed out, shows, we think, without conflict that such improvements were not only necessary to the preservation of the common property, but enhanced its rental value, and that the resulting profits were shared equally with the plaintiff. To permit the plaintiff to participate in the benefits which must have resulted from improvements necessary to the preservation of the entire property, and at the same time share equally in the increased rentals which followed the making of a part of the improvements, would manifestly be inequitable unless provision be also made upon partition for suitable compensation to Tiscornia for the cost of such improvements.

It follows that the decree appealed from must be reversed in so far as it concerns the issue relating to the improvements to the common property, and the cause remanded for a retrial upon that issue alone, to the end that the defendant Tiscornia's claim against the plaintiff for contribution may, in keeping with the evidence, be equitably adjudicated. Accordingly it is ordered that the judgment and order appealed from be reversed.

Kerrigan, J., and Richards, J., concurred.

[Civ. No. 1295. First Appellate District.—December 30, 1913.]

**AIGELTINGER COMPANY (a Corporation), Respondent,
v. HEALY-TIBBITTS CONSTRUCTION COMPANY
(a Corporation), Appellant.**

GARNISHMENT—ACTION AGAINST GARNISHEE—EVIDENCE SHOWING NO INDEBTEDNESS AT TIME OF GARNISHMENT.—In this action by a judgment creditor against a garnishee, on the ground that at the time the garnishment was levied there was sufficient money in the hands of the defendant due the judgment debtor to meet the judgment creditor's claim, the evidence shows there was nothing then due from the garnishee.

ID.—TEST OF RIGHT OF GARNISHMENT—EXISTENCE OF RIGHT OF ACTION. The true test of the right to maintain garnishment proceedings is the right of the defendant to sue the garnishee at the date of the attachment.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. B. V. Sargent, Judge presiding.

The facts are stated in the opinion of the court.

Edwin T. Cooper, and Hobart K. Eells, for Appellant.

Wal. J. Tuska, for Respondent.

KERRIGAN, J.—Plaintiff recovered judgment for \$936.25, interest and costs. Defendant appeals.

The facts in this case are as follows: The defendant, Healy-Tibbitts Construction Company, a corporation, entered into a contract with the board of public works of the city and county of San Francisco, whereby it agreed to construct the Twin Peaks reservoir. Thereafter the defendant entered into a written contract with the Atlas Construction Company for the performance of the excavation work upon said Twin Peaks reservoir. In said contract it was provided that payments should be made upon the fifteenth day of each month, covering the value of seventy-five per cent of work performed during the preceding month; the remaining twenty-five per cent to be paid thirty-five days after the final completion

and acceptance of all work included in said contract. Said contract was assigned to Atlas Building and Construction Company, and it commenced the work of excavation some time in March, 1910, and in June following it ceased to do any further work and abandoned said contract. During the months of March, April, and May, 1910, the Atlas Building and Construction Company performed work under the contract. It reported each month to the defendant the amount of work performed, and it was paid seventy-five per cent thereof on the fifteenth day of the succeeding month. In other words, it was paid everything due it according to contract for all work performed prior to June 1, 1910.

On the twenty-first day of June, 1910, plaintiff commenced an action against the said Atlas Building and Construction Company for the sum of \$923.45. In said action a writ of attachment was issued, and on the twenty-first day of June, 1910, at 5 o'clock P. M., was regularly served on Healy-Tibbitts Construction Company. After judgment, execution, supplementary proceedings, and demand, plaintiff commenced its present action against defendant, alleging that at the time said attachment was served there was sufficient money in defendant's hands due the Atlas Building and Construction Company to meet the same. On the twenty-third day of June, the defendant accepted from the Atlas Building and Construction Company a surrender and cancellation of the contract.

Defendant claims: 1. That the garnishment was served upon it at a time when there was no money due from it to the Atlas Building and Construction Company; 2. That all money due said company for work performed during the month of June was paid in the discharge of claims for labor performed upon said excavation work which claims were preferred over any claim the company may have had; and, 3. That upon the abandonment of the contract the defendant was compelled to complete the work which had been undertaken by the Atlas Building and Construction Company, and that in doing so it incurred a loss of a sum of money far in excess of any amount which may have been due from it to the Atlas Building and Construction Company.

The court refused to allow the defendant to introduce any evidence in support of its second and third defenses, but we

deem any discussion of the court's action as to those matters unnecessary in view of the conclusion we have reached as to the first point urged by defendant.

We agree with defendant that the evidence shows that there was nothing due from it to the Atlas Building and Construction Company at the time the garnishment was levied, and that the right to sue at the date of the attachment is the true test. (Code Civ. Proc., secs. 541, 544; 20 Cyc., p. 983; 14 Am. & Eng. Ency. of Law, 2d ed., p. 833; *Early v. Redwood City*, 57 Cal. 193; *Gregory v. Higgins*, 10 Cal. 339; *Cunningham Lumber Co. v. New York etc. Co.*, 77 Conn. 628, [60 Atl. 107]; *Simmons Hardware Co. v. Rose*, 140 Mich. 123, [103 N. W. 529]; *Mundt v. Shabow*, 120 Wis. 303, [97 N. W. 897]; *Edwards v. Roepke*, 74 Wis. 571, [43 N. W. 554]; *Excelsior Brick & S. Co. v. Haines*, 5 Penn. Co. Court. Rep. 631.)

The contract had been abandoned by the Atlas Building and Construction Company on or just before the 20th of June; the garnishment was levied the next day. At this time the Building Company had not performed the work for June required by the contract, nor had its failure to do so at that time been waived or excused, and therefore there was nothing due to it. (*Marchant v. Hayes*, 117 Cal. 669, [49 Pac. 840]; *Zimmerman v. Jourgenson*, 60 Hun, 578, [14 N. Y. Supp. 548].) Two days later the defendant accepted a surrender and cancellation of the contract; and at that time the defendant was doubtless bound to pay at once the reasonable value of the work performed during the month of June and up to the time of the abandonment (*Marchant v. Hayes*, 117 Cal. 669, [49 Pac. 840]); but as this was after the filing of the garnishment it lends no support to that proceeding.

It is conceded—as of course it should be in view of the well settled state of the law on the subject—that the twenty-five per cent retained percentages was not subject to garnishment. (*Williams v. Androscoggin etc. R. R.*, 36 Me. 201, [8 Am. Dec. 742]; *Medley v. American Radiator Co.*, 27 Tex. Civ. 384, [66 S. W. 87]; *Webber v. Bolte*, 51 Mich. 113, [16 N. W. 257]; *Kelley v. Bloomingdale*, 139 N. Y. 343, [34 N.

E. 919]; *Blythe v. Poultney*, 31 Cal. 234; *American Forcible Powder Mfg. Co. v. Malone*, 166 Pa. St. 289, [31 Atl. 90].)

The judgment is reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 27, 1912, and the following opinion then rendered thereon:

THE COURT.—The petition for hearing in this court is denied. The case being one within the appellate jurisdiction of the court of appeal, we do not look beyond the facts stated in the opinion of that court. (*Burke v. Maze*, 10 Cal. App. 206, 211, [101 Pac. 438, 440].) On those facts, it appears that there was, at the date of the garnishment, no debt, matured or unmatured, due the plaintiff. This being so, there was clearly nothing subject to attachment. We do not express any opinion on the correctness of the broader declaration of the district court of appeal that there must be, at the date of the garnishment, a present right of action; in other words, that a debt which is due, but not yet payable, may not be attached.

[Civ. No. 1187. First Appellate District.—December 30, 1913.]

CALIFORNIA RECLAMATION COMPANY (a Corporation), Respondent, v. NEW ZEALAND INSURANCE COMPANY (a Corporation), Appellant.

MARINE INSURANCE—DREDGE IN TOW OF TUG—ORAL EVIDENCE THAT INSURANCE COVERS BARGES.—A policy of marine insurance which undertakes specifically to insure the dredge "San Francisco" in tow of the tug "Sea Rover," from San Francisco to San Pedro, and which by its terms is silent as to any barge to accompany the dredge, may be shown by oral evidence to cover the towing of two barges attached to the dredge.

ID.—CONCEALMENT BY INSURED—REMEDIES OF INSURER.—If the fact that the two barges made a part of the tow was concealed from the insurer, he may rely upon such concealment in avoidance of the

policy in an action thereon by the insured. Rescission is not the exclusive remedy of one who has become entitled to avoid a contract by reason of acts or omissions of the other party to it which are fraudulent in their nature; he may cancel the contract by its rescission, or he may seek affirmative relief in a court of equity for any injury sustained by the wrongful act or omission of the other, or he may set up the fraud by way of defense to an action brought to enforce the apparent liability.

ID.—MATTERS MATERIAL TO RISK—LENGTH OF TOW—CONCEALMENT BY INSURED.—The fact that barges, increasing the length of the tow two or three times, are to be attached to a dredge to be towed by a tug upon the ocean in the winter time, is a material matter increasing the risk of the voyage, and a concealment thereof by the insurer is sufficient to avoid a policy of marine insurance.

ID.—FAILURE TO READ POLICY—RIGHT TO ASSUME THAT IT CONFORMS TO APPLICATION.—One who procures marine insurance has a right to rely on the presumption that the policy he receives is in accordance with the facts disclosed in his application, and his failure to read the policy will not relieve the insurer, whose duty it is to make the policy conform to the facts received from the insured.

ID.—CONCEALMENT OF FACTS BY BROKER—EFFECT ON LIABILITY OF INSURER.—Where the owner of a barge engages a firm of insurance brokers to obtain insurance on it during an ocean voyage, disclosing to them the facts material to the risk, and they apply for policies to a firm of general agents dealing in marine insurance, giving them the information they have received from their principal relative to the risk, but the latter agents, being unwilling to place the entire risk with their company, place part of it with an agent for another company, in accordance with a custom among local insurance agents, a policy issued by the latter company is not avoided because such latter agents did not communicate to it material facts which had been given to them.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

Andros & Hengstler, for Appellant.

Ira S. Lillick, and James S. Spilman, for Respondent.

RICHARDS, J.—This is an action brought to recover upon an insurance policy issued by the defendant to the plaintiff,

which by its terms insures "three thousand dollars on account of California Reclamation Co., in case of loss to be aid to assured or their order, at and from San Francisco to an Pedro, upon his or their interest as owners in the body, machinery, tackle, apparel, and other furniture of the good redge called the 'San Francisco' in tow tug 'Sea Rover,' alued at seventy-five thousand dollars."

The facts out of which the action arose are briefly these: he California Reclamation Co., a corporation, having its rincipal place of business at San Francisco, in the early art of January, 1906, purposed sending a dredge named San Francisco" to San Pedro, in tow of the tug "Sea over"; and, wishing to insure the dredge for the sea voyage, mmunicated with the firm of insurance brokers, Strong, elden & Farr, with whom they usually did business, with spect to placing the insurance. The brokers were given the ame of the dredge and its dimensions and destination, and ere also informed that it was the intention to tow one or o barges astern of the dredge, the dimensions of which ere also given. It was understood that these brokers were act as the agents of the California Reclamation Co., in aing the desired insurance with other companies doing the usiness of marine insurance. This they undertook to do, d presently solicited the desired insurance from the firm

Harrison & Co., stating to the members of that firm the formation they had received from their principal regard- g the dredge to be insured and the barges to be taken in w. They presently received from Harrison & Co. several urance policies covering the dredge, among which was the icy upon which this action is predicated, and which as the description of the thing insured was in the language st above quoted. The firm of Harrison & Co. is in the siness of marine insurance, being the general agents for veral insurance companies in this line of business. Mr. arrison, the head of this firm, testified that there is a cus- n as to the interchange of business between agencies, and at in accord with this custom both Mr. Harrison and the ief clerk of his firm, Mr. Burlem, took up the matter of e placing of a part of this insurance with a Mr. Fritsch, insurance broker doing business on the street and having esk in the office of the New Zealand Insurance Company.

There is a conflict in the evidence as to whether Mr. Burlem disclosed to Mr. Fritschi the fact that two barges were to be attached to the dredge; but it is undisputed that Fritschi did not convey this information, if he received it, to the appellant herein. The policy as issued by the latter makes no mention of barges. The commission for the several policies was divided among the several companies or persons connected with their issuance.

The tug "Sea Rover" started on the trip to San Pedro on January 11, 1906, having in tow the dredge "San Francisco," which in turn had in tow the two barges. A storm was encountered outside the heads, and the dredge went ashore near Bolinas Bay and sustained damage, for which the appellant, if liable at all, is liable in the pro rated sum of six hundred and thirty dollars.

Upon the trial the jury awarded the plaintiff this sum, for which judgment was entered, and, a new trial being denied, the appellant prosecutes these appeals.

It is the first contention of the appellant herein that the respondent ought not to have recovered on the policy in question for the reason that it insures the dredge "San Francisco" in tow of the tug "Sea Rover"; and that any addition to either the dredge or the tug in the way of tow which materially increased the risk was such a change in the very subject matter of the insurance as worked a vitiation of the policy, and that oral evidence ought not to have been admitted to vary the precise terms of the policy as to the subject matter of the insurance.

We think that this is too narrow a view to take of the insurance contract in question; and that though it undertakes specifically to insure the dredge "San Francisco" in tow of the tug "Sea Rover," since its terms are silent as to any barge or barges to accompany the dredge, a reasonable construction of this provision would permit either party to show the fact to be that other objects than the specified dredge were or were not understood by the parties to be, though uninsured, a part of the tow.

The early Mississippi case of *Natchez Ins. Co. v. Stanton*, 2 Smedes & M. (Miss.) 340, [41 Am. Dec. 592], while undoubtedly correct as to the law applicable to the facts of that case, lays down a rule of construction the strictitude of

which we think must yield to the more liberal rule of our code for the interpretation of contracts; in fact in this case the chief reliance of appellant seems to be upon the point that there was a material concealment upon the part of the assured as to the inclusion of the two barges as a portion of the tow of the tug "Sea Rover"; and that since the appellant issued its policy in ignorance of the fact that said barges were to be attached to the dredge and made a part of said tow; and since their attachment materially increased the risks and dangers of the voyage without its knowledge or consent, the appellant should not be held liable for the loss. It is the contention of the respondent that even though it should be conceded that the insured was to be charged with concealment in not having brought to the notice of the appellant as the ultimate insurer issuing the policy in question, the fact that the two barges were to be made a part of the tow, still the insurer may not rely upon such concealment in avoidance of its policy for the reason that the statute makes concealment a specific ground for the rescission of insurance contracts (Civ. Code, sec. 2562); and hence that rescission was the exclusive remedy of the insurer upon the discovery of the fact of concealment.

We do not so understand the law. Rescission is not the exclusive remedy of one who has become entitled to avoid a contract by reason of acts or omissions of the other party to it which are fraudulent in their nature. He may cancel the contract by its rescission; or he may seek affirmative relief in a court of equity for any injury sustained by the wrongful act or omission of the other; or he may set up the fraud by way of defense to an action brought to enforce the apparent liability. (*Toby v. Oregon Pac. R. R. Co.*, 98 Cal. 490, [33 Pac. 550]; *Field v. Austin*, 131 Cal. 379, [63 Pac. 692]; *More v. More*, 133 Cal. 489, [65 Pac. 1044]; *Mabry v. Randolph*, 7 Cal. App. 421, [94 Pac. 403].)

This brings us to the ultimate question to be decided in this case, viz.; whether or not there was such a concealment of material facts affecting the nature of the risk which the policy in question was issued to insure, as to entitle the insurer to avoid the policy.

The first query presented is as to whether or not the concealment, if any, of the fact that two barges, of the di-

mensions of those shown to exist in the present case, were to be attached to the dredge in question, would work a material change and increase in the risk attending the voyage. We think the practically undisputed evidence leaves no room for doubt upon this question. The attachment of the barges to the dredge increased the length of the tow about a thousand feet; and it should require no argument and little knowledge of marine risks and dangers to arrive at the conclusion that the going forth of a tug upon the ocean in winter with a tow of sixteen hundred feet in length would be attended by a material increase in risk and danger over a like voyage with a tow six hundred feet in length. We are of the opinion therefore that the concealment, if any, in this case was a material concealment sufficient to have avoided the policy upon which this action is brought.

But was there in fact any such concealment? Certainly the plaintiff cannot be charged with any direct act of concealment. Its manager, Mr. Perry, disclosed every fact relating to the dredge and the two barges, which it was intended should accompany the dredge during the voyage, to the insurance brokers, Strong, Belden & Farr, through whom it was desired to place the insurance upon the dredge. There is some conflict in the evidence as to whether these brokers conveyed this information to Harrison & Co., the general agents dealing in marine insurance to whom application was made for a policy or policies covering the insurance in question; but the jury resolved this conflict in favor of the respondent, and by its action we are bound. There is also some conflict in the evidence as to whether Harrison & Co. informed the broker Fritschi of the fact that the barges were to be included in the tow; but in this respect also the jury has found in favor of the respondent.

This narrows the inquiry to one remaining question: Whom are Harrison & Co. and the broker Fritschi to be considered as representing in the placing of the portion of this insurance for the recovery of which this action was brought? Were they the agents of the respondent? If so, their failure or that of either of them to indicate to the appellant the fact of the intended inclusion of the barges in the tow would amount to a material concealment which would avoid the policy. Were they or either of them the agents of the ap-

pellant? If so, the insurer is charged with the full extent of their knowledge; and hence there was, as to the appellant, no concealment.

The answer to these inquiries is to be found in a process of reasoning based upon the facts of the case. The firm of Strong, Belden & Farr were the conceded agents of the plaintiff in placing the insurance in question. They applied to the firm of Harrison & Co., who were in the business of marine insurance and were general agents for several companies, for a policy or policies upon the dredge; and in so doing disclosed to that firm the fact of the intended taking of the barges as a part of the tow. Had the firm of Harrison & Co. issued all of the insurance upon the dredge, including the policy in question, there can be no doubt as to their liability for the loss sustained; nor could the firm of Harrison & Co. have avoided this liability by showing that the barges were not referred to in the policy. The insured had a right to rely on the presumption that the policy it received was in accordance with the facts disclosed in its application, and its failure to read the policy will not relieve the insurer, whose duty it would be to make the policy conform to the facts received from the insured. (*McElroy v. British Assurance Co.*, 94 Fed. 990, [36 C. C. A. 615].) If, then, Harrison & Co. would have been liable to the respondent for this loss had they directly issued this policy, is not the appellant to whom Harrison & Co. parceled out its share of this risk also liable? Harrison & Co. were the general agents of several insurance companies engaged locally in the marine insurance business. Edgar Alexander was the marine secretary and local general agent of the New Zealand Insurance Company, engaged locally in the same business. A. R. Fritsch was a broker representing no insurance company, but having an office or headquarters, desk room free, in the offices of the New Zealand Insurance Company. There was a custom among the local agents of insurance companies to exchange or divide up business among the several companies represented by them, so that if one of their number received an order for a block of insurance larger than he could or was willing to carry in his particular company he parceled it out among his fellow agents who were willing to assume for their principals a share in the risk. In accordance with

this custom Harrison & Co., through the medium of Fritschi, placed the share of this insurance in question with their fellow agent Alexander, who took the same for his company, knowing that it was, so to speak, overflow insurance being passed out by Harrison & Co., with whom he had done business before, and in accordance with the aforesaid custom with which he was familiar. The policy when written was delivered to Harrison & Co., and it was from that firm the appellant received its share of the commission. Under such conditions the appellant must be held to stand in the place of Harrison & Co., to be bound by their knowledge, and to be liable to the same extent that they would have been liable if they had directly issued this policy. (*May v. Western Assur. Co.*, 27 Fed. 260; *Queen Ins. Co. v. Union Bank & Trust Co.*, 111 Fed. 697, [49 C. C. A. 555]; *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, [34 Am. St. Rep. 877, 32 Pac. 458]; *McElroy v. British American Assur. Co.*, 94 Fed. 990, [36 C. C. A. 615]; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177, [24 N. E. 100]; *Teutonia Ins. Co. v. Ewing*, 90 Fed. 217, [32 C. C. A. 583].)

The case of *Parrish v. Rosebud Min. & M. Co.*, 140 Cal. 635, [74 Pac. 312], is not in conflict with these views nor with the authorities above cited, since the reasoning of that case would only go to the extent of creating Strong, Belden & Farr the agents of the insured, but would not so extend that agency as to include Harrison & Co., to whom, as general agents doing marine insurance, the application of the insured was made.

The judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on February 27, 1914.

[Civ. No. 1226. First Appellate District.—December 31, 1913.]

ALAN FRANK WILLIAMS, by M. A. Steen, his Guardian *ad litem*, Appellant, v. BENJAMIN IDE WHEELER et al., Respondents.

STATE UNIVERSITY—STATUS AS CONSTITUTIONAL DEPARTMENT OF BODY POLITIC.—In the constitution of 1879, by section 9 of article IX thereof, the University of California was raised to the dignity of a constitutional department or function of the state government.

ID.—HEALTH REGULATIONS—POWER OF REGENTS TO REQUIRE STUDENTS TO BE VACCINATED.—In the absence of any express legislative action looking to the adoption of a general law requiring vaccination as a condition of admission to a public educational institution, the board of regents of the state university have the right to make and enforce a reasonable rule upon that subject.

ID.—VACCINATION AS PREREQUISITE TO ENTERING UNIVERSITY—POWER OF REGENTS TO DEMAND.—The board of regents of the university of California have power to adopt and enforce a rule requiring vaccination as a prerequisite to the admission of a student to the university, in the absence of legislation lawfully limiting the exercise of that power.

ID.—EXEMPTION CLAUSE IN VACCINATION STATUTE—WHETHER AVAILABLE TO STUDENTS OF UNIVERSITY.—The provision of the act of 1911 (Stats. 1911, p. 295) which seeks to exempt those persons who are conscientiously opposed to the practice of vaccination from the operation of the law, otherwise general in its terms, requiring vaccination of persons seeking admission to educational institutions, is not in the nature of a health regulation; and, not being so, it is not such a proviso as comes within the general police powers with which the legislature is invested. Hence it cannot be availed of by those seeking enrollment in the University of California, to nullify the effect of the rule of the regents of the university that every person in attendance as a student, or applying for enrollment as such, shall produce evidence satisfactory to the authorities thereof that he has been successfully vaccinated within seven years prior to such attendance or application, or else be vaccinated.

APPEAL from a judgment of the Superior Court of Alameda County refusing a Writ of Mandate. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Samuels & Magnes, and Jacob M. Blake, for Appellant.

Warren Olney, Jr., and Jared How, for Respondents.

RICHARDS, J.—This is an appeal from a judgment of the superior court of the county of Alameda, denying the application of the appellants for a writ of mandate.

The facts are briefly as follows: The plaintiff, Alan Frank Williams, a young man of the age of eighteen years, applied to be enrolled as a student at the University of California. The rules of the board of regents of the university require that every person in attendance as a student, or applying for enrollment as such, in the university, shall produce evidence satisfactory to the authorities thereof that he has been successfully vaccinated within seven years prior to such attendance or application; or else be vaccinated. The plaintiff had not been successfully vaccinated within such period, and refused to be vaccinated, but presented to the authorities in charge of the university a statement in writing signed by his parents, stating that such parents were conscientiously opposed to the practice of vaccination and would not consent to the vaccination of said plaintiff. The authorities of the university still refusing him admission as a student therein, the plaintiff, by his guardian *ad litem*, applied to the superior court for a writ of mandate to compel such admission. The application was heard upon stipulated facts and was denied; whereupon plaintiff prosecutes this appeal.

It is the contention of the appellant that, having met the requirements of the general law as set forth in the statutes of 1911, prescribing the conditions with respect to vaccination to be complied with for admission as a student to the educational institutions of the state, he is entitled to enrollment in the university.

The act of 1911 (Stats. 1911, p. 295) provides that within five days after any child or person shall be received, enrolled, entered or employed in any school, college, university, academy or other educational institution within the state of California, such child or person shall file with those in authority over such institution, (a) a certificate showing that such child or person has been successfully vaccinated within seven years prior to the date thereof; or (b) a statement in

riting signed by his or her parent, or guardian if such child or person be a minor, or by himself in other cases, stating that such parent or guardian or person is conscientiously opposed to the practice of vaccination, and will not consent to the vaccination of such child or person; or (c) a certificate of a duly licensed and practicing physician, stating that the physical condition of such child or person is, at the time, such that vaccination would seriously endanger the life or health of such child or person. The act further provides that any child or person failing, neglecting, or refusing to file either the certificate showing successful vaccination within the prescribed period, or the statement or certificate required to work an exemption of the child from the requirement of vaccination, shall be excluded from admission to the institution until he or she complies with the law.

The appellant, having presented to the authorities in charge of the university the statement of his parents in proper form to the effect that they were conscientiously opposed to the practice of vaccination and would not consent to his vaccination, insists that he thereby, being otherwise qualified, became entitled to admission to the university, and is now entitled to a writ of mandate to compel his enrollment as a student therein.

The respondents oppose this contention of the appellant on several grounds:

1. That the board of regents of the University of California have been invested by the constitution and statutes governing its foundation and control with full power over the matter of the admission of students to the university, and with exclusive authority to make and enforce rules for its government, and to prescribe the terms upon which students may exercise the right to enter or be enrolled therein; and that the power and authority with which the regents are thus invested is independent of legislative action and is not subject to legislative control; that in the exercise of this power and authority the board of regents have adopted a rule that no person shall be admitted or enrolled as a student in the university unless he shall either produce satisfactory evidence that he has been successfully vaccinated

within the period of seven years next preceding his application for admission; or else that he be vaccinated.

2. That the act of 1911, in so far as it attempts to interfere with the power and authority with which the regents of the university are thus invested, or with the rule, which they have adopted, is inoperative as to them, for the reason that it is not in that respect a health regulation; and

3. That the act of 1911, in that it undertakes to exempt those persons who are conscientiously opposed to vaccination from the other requirements of the act, is not a general law, and hence is unconstitutional and void.

We shall consider these several contentions in the order of their presentation.

The University of California looks for its foundation as a state institution to the act of the legislature of March 23, 1868, entitled "An act to create and organize the University of California" (Stats. 1867-8, p. 248). By the provisions of this act the university was established and declared to be under the charge and control of a board of directors to be known and styled the Regents of the University of California; and to this body was intrusted the general government and superintendence of the institution, with the power to prescribe rules for its government and to fix the qualifications for the admission of students thereto. The act also provided that "Any resident of California, of the age of 14 years or upwards, of approved moral character, shall have the right to enter himself in the university as a student at large . . . on such terms as the board of regents may prescribe." The act of 1868 was subjected to one unimportant amendment in 1871-2, and the general subject and terms of the act were carried into the Political Code adopted in 1872, where they remain without material change as to the matters involved in this inquiry, to the present time. (Pol. Code, secs. 1385 to 1477.) By the constitution of 1879 the University of California was raised to the dignity of a constitutional department or function of the state government, by the provisions of section 9 of article IX thereof, which read as follows:

"Sec. 9. The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed

by the Organic Act creating the same passed March twenty-third 1868 (and the several acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments and the proper investment and security of its funds."

Whether or not the framers of the constitution intended by the terms of the above section that the Organic Act of 1868, and the substance of that act as embraced in the Political Code adopted in 1872, and in being when the constitution was framed, were to be so far read into the constitution itself as to place the university thereafter, in respect to the details of its internal government, beyond all future legislative interference or control, it is not necessary at this time to determine; but it would seem to be very plain that it was the intention of the framers of the constitution to invest the board of regents with a larger degree of independence and discretion in respect to these matters than is usually held to exist in such inferior boards and commissions as are solely the subjects of legislative creation and control. This would seem to be a necessary conclusion from the fact of the elevation of the university to the place and dignity of a constitutional department of the body politic, and from the express terms of the constitution itself to the effect that its organization and government should be perpetually continued in the form and character prescribed by the act of its foundation, and that in those respects it should not be subject to legislative control. The investment of the authorities of the university with this amplitude of power and discretion in the management of its affairs must be held to include the power to make reasonable rules and regulations relating to the health of its students, and especially to make and enforce such reasonable regulations as would tend to prevent the introduction and spread of contagious disorders amongst the student body. In the making of such rules and regulations they might doubtless adopt whatever preventive means had met the approval of medical science and experience. The practice of vaccination as a means of preventing the infection and spread of smallpox has had the approval of both science and experience for more than a century in the old world and in the older states of our Republic, and has been an improved method of inoculation for more than sixty years

in the state of California, as will appear from our legislation on the subject dating as far back as 1852. In the absence of any express legislative action looking to the adoption of a general law, requiring vaccination as a condition of admission to a public educational institution, we think it undeniable that the board of regents had the right to make and enforce a reasonable rule upon that subject.

That the foregoing rule which the board of regents did adopt and are still seeking to enforce, is a reasonable rule, would seem to have been determined by the supreme court and the appellate courts of this state with respect to a similar rule enacted by the state legislature in 1889, and which has been passed upon approvingly in the following cases: *Abeel v. Clark*, 84 Cal. 226, [24 Pac. 383]; *French v. Davidson*, 143 Cal. 658, [77 Pac. 663]; *State Board of Health v. Board of Trustees*, 13 Cal. App. 514, [110 Pac. 137]. In the leading case of *Abeel v. Clark*, the language of the supreme court is enlightening and instructive upon the point under present consideration. The court says:

“The act referred to is designed to prevent the dissemination of what, notwithstanding all that medical science has done to reduce its severity, still remains a highly contagious and much dreaded disease. While vaccination may not be the best and safest preventive possible, experience and observation—the test of value of such discoveries dating from the year 1796, when Jenner disclosed it to the world—have proved it to be the best method known to medical science to lessen the liability to infection with the disease. This being so, it seems highly proper that the spread of smallpox through public schools should be prevented and lessened by vaccination, thus affording protection both to the scholars and to the community.”

In the light of this long held attitude of the law toward the practice of vaccination as a preventive of smallpox, we are of the opinion that the board of regents of the University of California had power to adopt and enforce the rule requiring vaccination as a prerequisite to the admission of a student to the university, in the absence of legislation lawfully limiting the exercise of that power.

This brings us to the question as to what, if any, power remains with the legislature to pass laws controlling the matter

of the admission of students to the University of California, or limiting the operation of a rule of the regents of the university with respect to the terms of admission of students thereto, in the light of the foregoing provision of the constitution that as to such matters the authorities in charge of the university shall not be subject to legislative control.

It is undoubtedly true, as conceded by the respondents, that there are certain subjects affecting the general welfare over which the legislature has been wisely invested with ultimate control. These subjects are those embraced within the general police powers of the state; and among them is the subject of the general health. It is admitted that over this subject the state legislature has the ultimate control; and that in the exercise of that control it has power to pass general laws, in the nature of health regulations, upon the subject of vaccination prescribing the extent to which persons seeking entrance as students in educational institutions within the state must submit to its requirements as a condition of their admission; and it is also conceded by the respondents that in so far as such an act of the legislature comes within the definition of a general law, and as such also comes within the general police powers of the state as a health regulation, the rules and regulations of the board of regents of the university must give way before it.

The appellant herein contends that the act of the legislature of 1911 relating to vaccination is such a law. The respondents contend that the act of 1911, in so far as it provides for the general vaccination of those seeking admission as students in educational institutions, is a re-enactment of the rule of the university, and hence that the appellant is not aided by it; but that in so far as it undertakes to provide that those persons, seeking admission to educational institutions, who aver themselves to be conscientiously opposed to vaccination, need not comply with the provisions of the act requiring vaccination, it is not a health regulation; and hence that the authorities in charge of the university are not subject to its control. The respondents further contend that the act of 1911, in that it contains the aforesaid exemption, is not a general law, and is therefore unconstitutional and void.

As has been heretofore seen, the state of California stands committed to the policy of requiring vaccination as the best

preventive means known to medical science for lessening the liability to infection with a dreaded and dangerous disease. The act of 1889 upon that subject was entitled "An act to encourage and provide for a general vaccination in the state of California"; and the act of 1911, which replaces the former act, is also entitled "An act to encourage and provide for a general vaccination for all public and private schools of California, etc." If, as the titles of these two acts indicate, it is the policy of the state of California to encourage and provide for a general vaccination as the most effective method known to medical science for preventing the spread of an infectious and dangerous disease, and as such is a reasonable and proper health regulation, how can a provision of the law be also held to be a health regulation which exempts from vaccination all those who are conscientiously opposed to that means of prevention? Vaccination is a surgical operation and medical treatment addressed to the physical system of the individual patient, and effectuating his inoculation from the contagious disease of smallpox, without regard, so far as medical science teaches, to the mental attitude of the patient toward the law requiring submission to it, and more certainly regardless of what the mental attitude of his parents or guardians may be. It would rather seem to be the very opposite of a health regulation for a law, whose title declares its purpose to be "To encourage and provide for a general vaccination," to have embraced within it a proviso exempting from such vaccination those whose mental attitude is that of opposition to the avowed object of the law. To take an extreme illustration: Suppose that a law, requiring the quarantine of persons actually afflicted with smallpox, should contain a proviso exempting from its operation those who should declare themselves conscientiously opposed to being quarantined, would such an exemption be valid as a health regulation? Clearly not. The object and effect of such an exemption in such case, as in this, would be to defeat the very intent of the law itself, by an exception, not founded upon considerations of health, destroying that generality within the sphere of its operation which would be essential to its effectiveness as a health regulation. In our opinion, therefore, the provision of the act of 1911, which seeks to exempt those persons who are conscientiously opposed to the

practice of vaccination from the operation of the law, otherwise general in its terms, requiring vaccination of persons seeking admission to educational institutions, is not in the nature of a health regulation; and that, not being so, it is not such a proviso as would come within the general police powers with which the legislature is invested; and hence that it cannot be availed of by those seeking enrollment in the University of California to nullify and avoid the operation and effect of the existing rule of the authorities of the university upon the subject of vaccination.

These views make it unnecessary in this case to decide whether the act of 1911, considered in its entirety and with reference to its effect upon other educational institutions which do not stand in the same relation to it or to the state as the University of California, and which are not before the court, is or is not a general law.

The judgment is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 1198. Third Appellate District.—December 31, 1913.]

WILLIAM DURBROW, Appellant, v. J. P. CHESLEY,
Respondent.

APPEAL—SUBSEQUENT ORDER OF TRIAL COURT CONSOLIDATING ACTIONS—WHETHER ABROGATES APPEAL.—An appeal from an order setting aside a default judgment is not abrogated by a subsequent order of the trial court consolidating the action with others pending in such court.

ID.—TAKING OF APPEAL—EFFECT AS DEPRIVING TRIAL COURT OF JURISDICTION.—After the taking and perfecting of an appeal to the supreme or appellate courts from a judgment or an order rendered or made by the superior court, the latter tribunal loses jurisdiction to make any order or to carry out any proceedings in the action which would have the effect of vitiating the appeal or preventing the review of all alleged errors brought up by a duly prepared and authenticated record.

APPEAL from an order of the Superior Court of Butte County vacating a default judgment. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. R. King, and Carleton Gray, for Appellant.

E. J. Corkin, for Respondent.

HART, J.—The respondent presents this motion to dismiss the appeal in this action from an order setting aside and vacating a judgment entered upon the default of said respondent in failing to answer the complaint within the time required by law after service upon him of the summons and a copy of said complaint.

The notice of motion states that the same “will be made upon affidavit served herewith, and on all the proceedings and pleadings in this action.”

The affidavit, in substance, declares that several actions relating to the subject matter of the present action were and are pending in the superior court of Butte County, to wit: Action No. 6435, wherein one Joseph L. Wilson is the plaintiff, and one J. P. Chesley is the defendant; action No. 6441, in which one William Durbrow is the plaintiff and said J. P. Chesley is the defendant, and action No. 6442, wherein said J. P. Chesley is the plaintiff and said William Durbrow, said Joseph L. Wilson and one B. F. Johnson are the defendants; that, since the perfection of the present appeal, the said superior court of Butte County “has made an order that the three said actions be consolidated in one action”; that said order was made on the twenty-seventh day of October, 1913, “and that since the consolidation of said actions, this appeal has no significance and therefore could have no legal effect, its purpose having been abrogated by the consolidation.”

There is no merit in this motion.

In the first place, it is to be observed that it does not clearly appear from the affidavit that the action involved in the present appeal is one of the several actions which were consolidated by the order of the court; but, assuming that this action is one of the three so consolidated, the order of consolidation could not have the effect upon this appeal claimed for it by counsel, for no proposition is better settled than that after the taking and perfecting of an appeal to the supreme or appellate courts from a judgment or an order rendered or

made by the superior court in an action, the latter tribunal loses jurisdiction to make any order or to carry out any proceedings in such action which would have the effect of vitiating the appeal or preventing the review of all alleged errors brought up by a duly prepared and authenticated record. "By the appeal from the order denying a new trial, the subject matter of that order was removed from the superior court, and while the appeal was pending that court had no jurisdiction to change the order" (*People v. Mayne*, 118 Cal. 516, [62 Am. St. Rep. 256, 50 Pac. 654]), or, it may be added, to make any other order or to do any act in the case materially affecting the order appealed from. And so it is true of a judgment or any appealable order from which an appeal has been taken. (See Hayne on New Trial and Appeal, p. 1216, et seq.) As is said by the author of that very excellent work: "While the cause is pending in the higher court, the effect of a perfected appeal is to preserve the rights of the parties to the controversy in the same condition as when the appeal was perfected. The *status quo* is preserved. The fruits of the litigation are guaranteed to the successful party, . . . Were it otherwise, few appeals would ever be prosecuted. The functions of the appellate jurisdiction would be rendered nugatory; for if those fruits were subject to be consumed by his adversary, pending the prosecution of his appeal, there would be no advantage in such prosecution." In other words and in brief, the remedy by appeal cannot be denied to an aggrieved party dissatisfied with the judgment or the order appealed from by an act of the trial court in the action, at the behest or on the motion of the respondent, after an appeal has been taken and is pending.

No reason has been disclosed justifying an order dismissing the appeal, and the motion to dismiss the same is, therefore, denied.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1197. Third Appellate District.—December 31, 1913.]

JOSEPH L. WILSON, Appellant, v. J. P. CHESLEY, Respondent.

APPEAL—TRANSFER BY BOTH PARTIES TO THIRD PERSONS OF PROPERTY IN LITIGATION—DISMISSAL OF APPEAL.—Where an appeal is taken from an order vacating a default judgment in an action of ejectment, and thereafter both of the parties transfer their respective interests in the property to a third person, the appeal will be dismissed.

Id.—COSTS—RETENTION OF APPEAL TO DETERMINE.—The court will not retain the appeal and decide alleged errors merely for the purpose of determining who is to pay, and who is entitled to receive, the costs on appeal, which are alone in issue. But as it appears from the record that the trial court abused its discretion in making the order from which the appeal is taken, the costs on appeal should be shared equally between the parties and not all placed on the appellant.

APPEAL from an order of the Superior Court of Butte County, setting aside a default judgment. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. R. King, and Carleton Gray, for Appellant.

E. J. Corkin, for Respondent.

HART, J.—This is a motion to dismiss the appeal taken in the above-entitled cause from an order setting aside the default of the defendant upon his failure to answer the complaint within the time prescribed by law, and vacating the judgment entered upon said default. The motion is supported by an affidavit filed by the defendant and recourse to "all of the proceedings and pleadings had in this action."

The action is in ejectment, and its purpose is to recover from the defendant the possession of certain real property, situated in Butte County, and for damages for the alleged unlawful withholding of such possession. The controversy grows out of a contract whereby the plaintiff agreed to sell

to the defendant and the latter agreed to purchase said property upon certain specified terms.

The affidavit of the defendant, which is not denied or controverted by the plaintiff, recites that "soon after the appeal was taken, to wit, on or about the 15th day of August, 1913, one B. F. Johnson purchased from the said J. L. Wilson, all of his equity in said property and also purchased of this affiant all of his interest in said property, thereby merging the title and the said possession of said land in the said B. F. Johnson; that at the time the said B. F. Johnson purchased the two equities aforesaid, it was for the purpose of settling this action, as was stated to this affiant at that time, and the said Joseph L. Wilson did transfer to said B. F. Johnson all of his right, title, and interest in said land, together with any damages that he may have sustained, and the said B. F. Johnson, in purchasing the equity of this affiant, did make it a part of the consideration that this affiant would be released fully and forever from any damage or expense by reason of his withholding this property; that it was the affiant's information and belief that the settlement aforesaid would include each and any cause of action of the aforesaid action and ejectment or of this appeal, and that the said action and this appeal would be dismissed and forever satisfied; that when this affiant learned that the said appeal had not been dismissed, he asked J. R. King, one of the counsel for the plaintiff and appellant, why the action had not been dismissed, and the said J. R. King advised him that the reason the said appeal had not been dismissed was that the appellant desired that the appeal be heard so as to determine who would pay the costs of the appeal; that the only right to be adjudicated by a decision of this court would be the question of costs, as all other matters therein have been settled and the subject has long ceased to exist."

From the uncontroverted verified facts contained in the foregoing affidavit, obviously no other conclusion is permissible than that the parties to this action have, since the taking of this appeal, relinquished and transferred absolutely to a third party their respective claims to any right, title, or interest which they may have had in and to the property which is the sole subject of this litigation; that the full and complete title to said property has thereby been vested and

merged in a single individual; that the parties to this action are no longer interested in the result of an adjudication of the controversy on this appeal, and that, indeed, by reason of the sale by both parties of their respective asserted interests in said property to one and the same party, in whom absolute title thereto has merged, there is remaining to be determined or decided by this court, no question, the decision of which could beneficially or injuriously affect either of the parties. In other words, there is no conclusion which this court could announce on the merits of the appeal which could have any effect, one way or the other, on the *status* of either of the parties to the action with respect to the subject matter thereof. As is said in the case of *In re Blythe*, 108 Cal. 124, 127, [41 Pac. 33], "in principle it matters not whether the relinquishment of the claim be voluntary, as by purchase, abandonment or compromise, or involuntary, as by final decree—in both cases the interest of the appellant in the controversy has come definitively to an end, and the decision on the appeal cannot affect the result as to the thing in issue before the court." And, as is said in *California v. San Pablo & Tulare R. R. Co.*, 149 U. S. 308, [37 L. Ed. 747, 13 Sup. Ct. Rep. 876]: "The court is not empowered to decide moot questions or abstract propositions, or to declare for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it."

Nor will the court retain the appeal and decide alleged errors merely for the purpose of determining who shall pay, and who is entitled to receive, the costs on appeal which are alone in issue. (Hayne on New Trial and Appeal, p. 1066.) The appellant in this case, according to the respondent's affidavit, voluntarily surrendered his right to maintain this appeal by disposing of his interest in the thing in controversy and thus leaving no "contest involving the determination of adversary rights." (*In re Blythe*, 108 Cal. 124, [41 Pac. 33].) In that case, speaking on this identical question, the court says: "Appellant contends that her rights to costs following a successful appeal, even if her right is found to be no greater than this, gives her such a substantial interest in the controversy as must compel the retention and determination of the questions presented by her appeal. But to this we cannot accede. Were appellant, for example, to de-

clare that she had surrendered her claim to respondent, and finally adjusted and disposed of the matter in controversy, saying that it had been agreed between them that the appeal should be pressed to a decision solely to determine which of the two should bear the costs, it would present a case not different in principle from the present, and, the costs being incidental to the judgment, the appeal would be dismissed as no longer being a contest involving the determination of adversary rights." (See, also, *Nelson v. Nelson*, 153 Cal. 205, [94 Pac. 880]; *Turner v. Markham*, 156 Cal. 68, 70, [103 Pac. 319].)

But, as to the costs on appeal, we think that, under the circumstances revealed here, the same should be borne and paid in an equal proportion by the appellant and respondent. It is true that, by disposing of his interest in the subject matter of the action or "the thing in issue before the court" while the appeal was yet pending, the appellant in practical effect abandoned the appeal; still, while not intending anything said here as the expression of a definitive opinion upon the merits of the appeal, which has not been submitted for decision, an examination of the record on appeal, which has been made a part of the record on this motion, has convinced us that there is merit in the appeal, by which we mean and do not hesitate to say that there is much apparent force in the contention of the appellant that the trial court, upon the record as it is presented here, abused its discretion in making the order from which the appeal is taken. We are, therefore, of the opinion that the appellant should not be required to bear the whole of the costs on appeal, but, as before suggested, that a division of that burden equally between both parties would be eminently just and equitable.

The appeal is dismissed, the appellant and respondent each to pay one-half of the costs on appeal.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 1429. Second Appellate District.—January 2, 1914.]

JENNIE S. WALKER et al., Respondents, v. THE CITY OF LOS ANGELES (a Municipal Corporation), et al., Appellants.

MUNICIPAL CORPORATIONS—ASSESSMENT DISTRICT—INDEFINITE DESCRIPTION IN ORDINANCE OF INTENTION.—Where the description of the boundary lines of an assessment district, as contained in the ordinance of intention, after a course has been traced to a point on the westerly line of Grand Avenue, proceeds "thence easterly in a direct line to the most westerly corner of lot 10 of Feldhauser's subdivision of blocks 85 and 86, Ord's survey, as per map," etc., and it appears from such map that there are two lots number 10 in the subdivision in question, both located in an easterly direction from the point on Grand Avenue referred to, the assessment is void because of the indefiniteness and uncertainty of the description, although both of such lots lie in an easterly direction from the point on Grand Avenue.

ID.—"EASTERLY"—INTERPRETATION OF WORD—QUALIFYING PHRASES.—

The word "easterly" in such description is qualified by the phrase, "in a direct line to the most westerly corner of lot 10," and must be deemed not to indicate a true easterly course. The word "easterly," when used alone, will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term, and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case, instead of meaning "due east," it means precisely what the qualifying word makes it mean.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

John W. Shenk, City Attorney, Charles D. Pillsbury, Charles D. Houghton, Deputy City Attorneys, and W. A. Martin, for Appellants.

Robert Young, for Respondents.

JAMES, J.—This action was brought by the owners of certain real property, which property was situated within

an assessment district intended to be created for the purposes of proceedings taken by the city of Los Angeles through its board of public works. The design of the proceedings was to open Twelfth Street in said city for a distance of about three blocks. The judgment which was rendered in favor of plaintiffs determined that the assessments under which sales of plaintiffs' properties were threatened to be made, were void by reason of the fact, as found by the trial court, that the description of the proposed assessment district as contained in the ordinance of intention was indefinite and uncertain. Defendants appealed from the judgment, and from an order of the trial court denying their motion for a new trial.

In the course of the description of the boundary lines of the assessment district as contained in the ordinance of intention, after a course had been traced to a point in the westerly line of Grand Avenue, the ordinance then proceeded: "Thence easterly in a direct line to the most westerly corner of lot 10 of Feldhauser's subdivision of blocks 85 and 86, Ord's survey, as per map recorded in book 5, at page 573, said miscellaneous records of Los Angeles County." The map of Feldhauser's subdivision of blocks 85 and 86, as introduced in evidence, showed that the lots of the subdivision in block 85 were numbered from 1 to 18, and the lots in block 86 were numbered in like manner. It therefore appeared from the map that there were two lots No. 10, in that subdivision and that both were located in an easterly direction from the point on Grand Avenue which was referred to in the ordinance. It was shown in evidence by the testimony of a surveyor that a line run due east from the point mentioned on the westerly side of Grand Avenue would intersect one of the lots No. 10, but that it would not intersect it at the most westerly corner of said lot, the point of intersection being about forty feet southeasterly from said westerly corner. In the case of *Fratt v. Woodward*, 32 Cal. 219, [91 Am. Dec. 573], referring to terms of description of boundary lines of real property, it is said: "It is true, as claimed by counsel for appellants, that the word "easterly" when used alone will be construed to mean due east; but that is a rule of necessity, growing out of the indefiniteness of the term, and has no application where other words are used for the purpose of

qualifying its meaning. Where such is the case, instead of meaning 'due east,' it means precisely what the qualifying word makes it mean." In this case, as the word "easterly" is qualified by the phrase, "in a direct line to the most westerly corner of lot 10," it must be deemed not to indicate a true easterly course. This is so because a line drawn due east from the point on Grand Avenue before mentioned would not intersect the westerly corner of either of the lots 10 in the subdivision described. If it appeared that it would intersect one of such corners and not the other, then it could properly be concluded that the corner which the due-east line did intersect would be the corner intended to be described. It then appears that lines may be drawn in an easterly direction from said point on Grand Avenue to the westerly corner of either of the lots numbered 10 in the subdivision referred to. If, as the defendants contend, one of these courses may be adopted with reasonable certainty as to the intention of the board in describing the district, which course shall it be? It is true that a line drawn to the westerly corner of the lot 10 which lies nearest the point on Grand Avenue will more nearly approximate a course due east from said point and be shorter than a line drawn from the same point to a similar point in the other lot 10 of the subdivision, and it may be argued that it is more probable that the board intended the boundary to take the course of the shortest line. This reasoning, however, in a proceeding of this kind, which is one *in invitum*, in which all of the requirements of the law must be strictly complied with, may not be adopted. The description as given in the ordinance of intention, when applied to the map referred to therein, contains a patent ambiguity which may not be removed by resort to parol evidence. (*Brandon v. Leddy*, 67 Cal. 43, [7 Pac. 33]; *Cadwalader v. Nash*, 73 Cal. 43, [14 Pac. 385].) A patent ambiguity appearing in the description of the intended assessment district, that description was rendered uncertain and indefinite, and was so correctly determined to be by the trial court. It follows that the assessments contemplated to be made under the proceedings were void and of no effect.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Crim. No. 319. Second Appellate District.—January 2, 1914.]

In the Matter of the Application of RICHARD WATTS BURNER, a Minor, for a Writ of Habeas Corpus.

JUVENILE COURT—COMMITMENT OF DEPENDENT MINOR—ABSENCE OF JURISDICTION—HABEAS CORPUS.—Where a petition, praying that a minor be taken into custody as a dependent child, fails to state any of the facts required by statute to constitute the child a dependent, an order of the juvenile court committing him to the custody of the probation officer is without jurisdiction and the child will be released on *habeas corpus*.

APPLICATION for a Writ of Habeas Corpus on behalf of minor in custody under an order of the juvenile court.

The facts are stated in the opinion of the court.

So Relle & Cruickshank, for Petitioner.

Shreve & Shreve, for Respondents.

THE COURT.—The petitioner, the father of Richard Watts Burner, applied for this writ on the ground that the respondents, the judge of the superior court of San Diego County, sitting as judge of the juvenile court, and the probation officer of the juvenile court, were detaining said minor child and restraining him of his liberty without any right or authority so to do. The return shows that said child is in the custody of the probation officer by virtue of a commitment issued out of said juvenile court which is based upon a petition praying that said child be taken into custody as a dependent child. No facts such as are required by the statute to constitute said child a dependent child are stated in the petition. The order was made without jurisdiction, and said Richard Watts Burner is hereby ordered to be discharged from the custody of such probation officer.

[Civ. No. 1267. First Appellate District.—January 6, 1914.]

WARATAH OIL COMPANY (a Corporation), Respondent,
v. **REWARD OIL COMPANY** (a Corporation), Appellant.

SPECIFIC PERFORMANCE—CONTRACT TO PURCHASE OIL LAND—POSSIBILITY OF SALE NOT A DEFENSE.—The vendor of oil land will not be denied specific performance of the contract of purchase merely because the property may be sold on the market for the contract price.

ID.—VALUE OF LAND—MARKET VALUE AS TEST.—The proper test of the value of the land in such action is its market value.

REFORMATION OF CONTRACT—MUTUAL MISTAKE IN OMITTING DATE.—Where the court in an action wherein one of the counts in the complaint is to have a contract for the purchase and sale of oil land reformed so as to insert the date thereof, finds that the failure to insert the date in the contract was a mutual mistake of the parties, the result of inadvertence and "unconscious forgetfulness," the court is not only warranted but compelled to decree reformation.

CORPORATION—SALE OF ENTIRE ASSETS—RATIFICATION OF TRANSACTION.—A contract to sell all the assets of a corporation cannot be repudiated on the ground that the delegation of authority to the president and secretary of the company to make the sale was void, if thereafter both parties assume and act upon the contract as though its validity were without question, and the directors pass a resolution expressly ratifying the sale and tender a deed of the property to the purchaser.

ID.—RATIFICATION OF CONTRACT—CONSENT OR REPUDIATION.—Such contract may be ratified by the corporation without the consent of the purchaser, and before he repudiates it.

ID.—SPECIAL DIRECTORS' MEETING—NOTICE—SPECIFYING OBJECT OF MEETING.—A notice of a special meeting of directors need not specify the object of the meeting.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Thomas H. Breeze, for Appellant.

A. L. Weil, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment in favor of the plaintiff for the sum of forty-three thousand two hundred dollars, reforming the contract upon which the recovery was had as prayed for by the plaintiff, and denying the defendant the relief asked in its cross-complaint; and comes here upon a bill of exceptions.

The action is based upon a contract that was made by the parties in November, 1909, for the purchase and sale of certain land in Coalinga, Fresno County, supposed to contain oil. It was agreed that the defendant would purchase the land from the plaintiff for one thousand eight hundred dollars per acre; one quarter of the purchase price was to be paid down, and the other three quarters were, by the terms of the contract, to be paid respectively six, ten, and fourteen months from the date thereof.

Defendant paid the first and second installments, but refused to pay the third and fourth, amounting to forty-three thousand two hundred dollars. Demand was made for the payment of these installments, and a deed to the property was duly tendered the defendant, but defendant declined to accept the deed or to pay the amount demanded.

The contract was not dated, although the provisions relating to the deferred payments therein provided for assume that it was.

Under the terms of the contract, defendant was entitled to take possession of the property, but never did so.

The complaint is in two counts, one to recover the aforesaid sum of forty-three thousand two hundred dollars, and interest; and the other to reform the contract so as to insert the date thereof, which is alleged to have been inadvertently omitted. Defendant, in addition to answering, filed a cross-complaint, by which it sought the return of the money paid by it, upon the ground that there was a total lack of consideration for the making of the contract upon its part, and also that the plaintiff had never been bound by the contract for the reason that its officers who signed it on behalf of the company were not authorized so to do.

Three of defendant's points are based upon the theory that the action is exclusively one for specific performance of the contract. Plaintiff, on the other hand, in answer to these points asserts that it has stated in the complaint the facts of

the case, and that while under them the action may be treated as one for specific performance of the contract, nevertheless, as it is only seeking to recover the amount due to it by the terms of the contract, it is a mere action of debt.

If plaintiff is right in this regard, these three points urged by defendant need not be considered. But defendant contends that, it never having taken possession of the property, the action cannot be regarded as one in debt; for to so consider it would, if the plaintiff recovered, permit it to retain possession of the property and to recover also the purchase price. In other words, that the instrumentalities of the law, as distinguished from equity, are powerless to afford complete relief.

This proposition seems not to have been squarely decided in this state; and as the exigencies of this case do not require decision of this point, it will be needless for us to discuss it. Regarding the action, therefore, as one for specific performance, we pass to a consideration of defendant's points. They are:

1. That the land sold by plaintiff to defendant was wholly ruined by percolating water at the time the contract was made, or that ruin from such cause is impending; that therefore there is either a total lack of consideration, or such a serious diminution in value as will render the contract unenforceable in equity.

2. The plaintiff proved that, not only at the time the contract was made, but at the time the suit was commenced and also at the time of the trial, the land was worth the contract price, and that consequently the enforcement of the contract by a court of equity will not benefit the plaintiff, but on the other hand will annoy and harass the defendant—in which event specific performance, being a matter not of right but of discretion, should be denied.

3. This point is based upon the theory that the plaintiff proved only the market value of the land, and that in cases of undeveloped mines or oil land, the intrinsic value must be shown; that plaintiff did not show it, and therefore it has not proved adequacy of consideration, and cannot be granted the relief sought.

Taking up these points in their order—it is sufficient to say as to the first point that while a portion of the testimony of

one of the witnesses might be construed as sustaining the contention of the defendant, it is clear that the rest of his testimony, as well as the testimony of all the other witnesses, is to the effect that the land in the oil market, from the date of the making of the contract down to the time of the trial, covering a period of more than two years, was amply worth the contract price.

In making the second point it would seem that counsel for defendant is inconsistent, for in urging the first point he insists that the land is worthless, or will be in the near future, and that consequently there is such a failure of consideration as will make the contract unenforceable; while in urging this point he is forced to admit that there is testimony in the record tending to show that the land is worth all the defendant agreed to pay for it. However, there is no merit in the position. This is not a case where the defendant could be injured and no benefit be derived by plaintiff; and there is no citation of authority, nor can there be, to sustain the theory that merely because the land may be sold on the market for the contract price, plaintiff will be denied specific enforcement. If there were any force in this attitude there would be no such action as specific performance by the vendor of real property, for if the consideration were adequate there could be no recovery, nor could there be any recovery under the code in case it were inadequate.

As to the third point, it is sufficient to say that the market value was the proper test of value of the land. (*San Diego Land Co. v. Neale*, 78 Cal. 63, [3 L. R. A. 83, 20 Pac. 372]; *Arcata etc. R. R. Co. v. Murphy*, 71 Cal. 122, [11 Pac. 881]; *Jacksonville & S. E. R. R. v. Walsh*, 106 Ill. 253; *Dupuis v. Chicago & N. W. Ry.*, 115 Ill. 97, [3 N. E. 720]; *Little Rock, J. Ry. v. Woofruff*, 49 Ark. 381, [4 Am. St. Rep. 51, 5 S. W. 792]; *Low v. Railroad Co.*, 63 N. H. 558, [3 Atl. 739]; *Searle v. Lackawanna R. R.*, 33 Pa. St. 57.) But even if this were not true, and plaintiff was required, as claimed, to show the intrinsic value, still there would be no merit in defendant's contention, for as a matter of fact there is evidence in the record to support the finding on this theory also.

Through an oversight the parties neglected to date the contract; and the defendant contends that the court committed error in permitting the contract to be reformed on the show-

ing made, by inserting the date on which it was executed. The contract was made and entered into on the thirteenth day of November, but defendant, if we follow his argument, asserts that the parties merely neglected to agree upon a date, and that it is only when parties have actually agreed in their oral negotiations upon the date when a contract shall take effect, or upon other essential features thereof which have been omitted from the written contract, that it will be reformed; that to reform a contract when the parties have failed to address their minds to the omitted provision would be in effect to make a contract for the parties, which of course is outside of the province of courts.

The evidence abundantly shows—and the court goes no further than to find—that the contract was in fact made on the thirteenth day of November, 1909, and intended to bear that date. It is clear that the failure to insert the date in the contract was a mutual mistake, the result of inadvertence and “unconscious forgetfulness” (Civ. Code, sec. 1577), under which circumstances the trial court was not only warranted but compelled to decree reformation. (*House v. McMullen*, 9 Cal. App. 664, [100 Pac. 344]; *Los Angeles v. New Liverpool Salt Co.*, 150 Cal. 21, 27, [87 Pac. 1029]; *Owsley v. Matson*, 156 Cal. 401, [104 Pac. 983]; 24 Am. & Eng. Ency. of Law, 648.)

The resolution of the board of directors of the plaintiff authorized its president and secretary to enter into a contract for the sale of the property here involved to the defendant, and bestowed upon them the discretion of fixing the terms and conditions thereof. The sale of the property embraced all the assets of the company; and it is the contention of the defendant that the board of directors thus delegated to the officers named “the exercise of fundamental and basic powers outside of the ordinary course of business of the corporation, which involved the employment of discretion”; that therefore the attempted delegation of authority was void, as also the acts of the president and secretary done by virtue thereof; and moreover that nothing done by the parties thereafter could or did remedy this defect in the transaction.

Assuming, without deciding, that this was a void delegation of power, still we have no doubt that the contract was sub-

sequently ratified by the corporation. It is not disputed that the resolution prior to its adoption was submitted to and approved by the attorney for the defendant, and that up to the time of the commencement of the suit both parties assumed and acted under the contract as though its validity was without question. Nor is it denied that the contract was signed by the president and secretary at a directors' and stockholders' meeting in the presence of the directors. Moreover, just before filing this suit the board of directors of the plaintiff passed a resolution expressly ratifying the sale, and caused a tender of a deed to the property to be made to the defendant. Later and after suit had been commenced the defendant attempted to rescind the contract, and demanded the return of the installments previously paid. We think this repudiation of the contract by the defendant came too late. We cannot subscribe to the doctrine relied upon by the defendant—and which finds support in a few cases—that there could be no ratification of the agreement by one of the parties without the consent of the other. Perhaps it is true that if the defendant had rescinded the contract before it was ratified, the defendant would be free from its obligations, but it did not do so. The weight of authority and the cases in this state hold that the act of an unauthorized agent may be ratified before the other party to the contract repudiates it. (31 Cyc., 1291; Huffcut on Agency, p. 53; *Salfield v. Sutter*, 94 Cal. 546, [29 Pac. 1105]; *San Francisco Clearing House v. MacDonald*, 18 Cal. App. 212, [122 Pac. 964].)

The notices of the special meetings of the board of directors of November 13, 1909, and January 14, 1911, did not state the object of the meetings; but the position of the defendant that the meetings were not valid on this account cannot be maintained, for it "appears to be the settled law of this state that a notice of a special meeting need not specify the object of the meeting." (*Seal of Gold Mining Co. v. Slater*, 161 Cal. 621, [120 Pac. 15]; *Bell v. Standard Quicksilver Co.*, 146 Cal. 699, 705, [81 Pac. 17]; *Granger v. Original Empire M. & M. Co.*, 59 Cal. 678.)

The judgment is affirmed.

Lennon, P. J., and Richards, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 5, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 6, 1914.

[Civ. No. 1422. Second Appellate District.—January 6, 1914.]

DORAN, BROUSE & PRICE (a Corporation), Respondent,
v. BUNKER HILL OIL MINING COMPANY (a Corporation), Appellant.

ESCROW—WHAT CONSTITUTES—DELIVERY OF DEEDS TO BANK TO AWAIT DECISION OF COURT.—Where two parties deliver three deeds to a bank, the plaintiff delivering two and the defendant one of them, under an agreement that the plaintiff, thirty days after notice of the affirmance of a certain decision by the supreme court and upon delivery to him of the third deed with certificate of title, will pay one thousand dollars to the bank on the defendant's account, and that the bank will then deliver his two deeds to the defendant, and that in case of default by the plaintiff the bank will, on demand, deliver the three deeds to the defendant, but that in case the supreme court reverses the decision in question the bank will return the deeds to the respective parties, the transaction constitutes a delivery to the bank in escrow.

ID.—UNAUTHORIZED WITHDRAWAL OF DEEDS—DELIVERY UPON FALSE REPRESENTATIONS.—In such case the defendant has no right to withdraw any of the deeds before the expiration of the time fixed for the happening of the event, or the performance of the condition upon which they are to be delivered; and if by means of false representations he obtains possession of the plaintiff's deeds and withdraws them from the depository, there is no valid delivery to him and he will be deemed to hold them and the property in trust for the plaintiff.

ID.—TRUST—ACTION TO ENFORCE—SUFFICIENCY OF COMPLAINT.—The complaint, in an action involving such transaction, which alleges such agreement and escrow, as well as the defendant's acts in wrongfully obtaining possession of the deeds, and prays that it be declared that the deeds and property are held by the defendant in trust for the plaintiff, as shown by the escrow agreement, is good as against general demurrer.

ID.—INTERPRETATION OF ESCROW AGREEMENT—DELIVERY OF DEEDS—

TITLE OF DEFENDANT.—It appears from the language of such escrow agreement that it was the intention of the parties that, while the defendant could not enforce specific performance of the contract by compelling the plaintiff to pay the ten thousand dollars without a title based upon a patent, he could, upon the decision referred to in his favor being affirmed by the supreme court, without showing title in fee vested in him, insist that the plaintiff should accept the deed as conveying such title as the defendant possessed and pay therefor the sum of ten thousand dollars, or, in the event of his failure so to do, insist upon his right to have the deeds held by the bank delivered to him.

APPEAL from a judgment of the Superior Court of Kern County and from an order refusing a new trial. Paul W. Bennett, Judge.

The facts are stated in the opinion of the court.

W. B. Beaizley, and Flint, Gray & Barker, for Appellant.

Byron Waters, George L. Sanders, and Albert E. Dunning, for Respondent.

SHAW, J.—Action to enforce an alleged trust. Judgment went for plaintiff, from which, and an order denying defendant's motion for a new trial, it prosecutes this appeal on a bill of exceptions.

Appellant insists that the court erred in overruling its general demurrer interposed to the complaint, which, in substance, discloses the following facts: Both defendant and plaintiff were corporations. On August 28, 1903, they entered into an agreement as follows:

"Instructions to the Crocker-Woolworth National Bank of San Francisco.

"Herewith we beg to hand you quitclaim deed from E. A. Doran, A. C. Brouse and Burton E. Green to the Bunker Hill Oil Mining Company, dated August 28, 1903, hereinafter referred to as deed No. 1.

"A quitclaim deed from Moran, Brouse & Price, incorporated, to the Bunker Hill Oil Mining Company, dated August 28, A. D. 1903, hereinafter referred to as deed No. 2, and

"A deed from the Bunker Hill Oil Mining Company to Doran, Brouse & Price, incorporated, hereinafter referred to as deed No. 3.

"All of the above deeds cover the northwest quarter (N.W. $\frac{1}{4}$) of the southwest quarter (S.W. $\frac{1}{4}$) of section twenty (20), township twenty-eight (28) south, range twenty-eight (28) east, M. D. B. & M., situate in Kern County, California, and are delivered by the parties to said deeds to the Crocker-Woolworth National Bank (hereinafter designated as the bank) in escrow, subject to the following terms, conditions and instructions:

"Whereas, there is a certain suit or action pending in the superior court of Kern County, state of California, entitled 'Bunker Hill Oil Mining Company, plaintiff, *vs.* W. M. Clark et al., defendants,' affecting the title to the real estate hereinabove particularly described;

"Now, if the supreme court of the state of California should by final judgment affirm the decision already rendered by the superior court of Kern County, in favor of the Bunker Hill Oil Mining Company,

"(1) It is hereby mutually agreed, that Doran, Brouse & Price will, within thirty days after notice in writing shall have been served on said Doran, Brouse & Price that the supreme court of the state of California shall have affirmed the decision by final judgment, upon the delivery to them of deed No. 3 and certificate of title showing the title of the property to be vested in the Bunker Hill Oil Mining Company free and clear of all encumbrances, pay to the bank, on account of the Bunker Hill Oil Mining Company, the sum of ten thousand dollars (\$10,000) in United States gold coin, said sum representing the purchase price of the above described real estate.

"(2) In the event of the decision of the supreme court being in favor of the Bunker Hill Oil Mining Company, and in the event of Doran, Brouse & Price having paid the ten thousand dollars, as above specified, the bank will deliver to the Bunker Hill Oil Mining Company deeds designated as Nos. 1 and 2, and to Doran, Brouse & Price deed No. 3, together with certificate of title above referred to.

"(3) In the event that the said Doran, Brouse & Price shall fail or neglect within thirty days after notice in writ-

ing shall be served on Doran, Brouse & Price that the supreme court of the state of California shall have affirmed the decision of the superior court of Kern County, state of California, in favor of the Bunker Hill Oil Mining Company, the plaintiff in the above mentioned suit, to pay or deposit with the bank the sum of ten thousand dollars (\$10,000) in United States gold coin in full payment of the purchase price of the real estate hereinabove described, then and in that event said bank will deliver to the Bunker Hill Oil Mining Company, its successors or assigns, on demand, all three deeds designated above as Nos. 1, 2, and 3.

"In the event that the supreme court of the state of California shall *reverse* the decision of the superior court of Kern County, state of California, in favor of the Bunker Hill Oil Mining Company, the plaintiff in the above mentioned suit, the bank will then return deed No. 1 to Doran, Brouse and Green, deed No. 2 to Doran, Brouse & Price and deed No. 3 to the Bunker Hill Oil Mining Company, or the heirs, successors or assigns of any of the above mentioned parties.

"Dated San Francisco, Aug. 28, A. D. 1903.

"BUNKER HILL OIL MINING COMPANY.

"By J. W. Wright, Pres.

"Lany, Sec.

"DORAN, BROUSE & PRICE (Inc.).

"By Doran, Pres.

"Price, Sec."

And on said date deposited the deeds described in the agreement with a bank to be held by it and delivered pursuant to the terms thereof. On September 1, 1908, defendant served upon the plaintiff notice of the affirmance of the judgment, and stating that unless plaintiff paid the ten thousand dollars within thirty days defendant would apply to the bank for a delivery of the deeds. On September 25, 1908, defendant, for the purpose of defrauding plaintiff, by means of representations made to the bank, to the effect that plaintiff and defendant had agreed that the bank should deliver the deeds to defendant, and that plaintiff had relinquished all right or claim thereto, induced the bank to deliver to it the said deeds so deposited under the terms of said agreement; that such representations were false and untrue; that defendant does not now and never has held title

in fee to the lands described in said agreement and deeds, and it is not now and never has been able to deliver a clear title to said property; that defendant retains said deeds with the intent to defraud plaintiff, but in trust for it. The prayer of the complaint is that it be declared that the deeds are held by defendant in trust for and on behalf of plaintiff, and that defendant hold such title as it has in the property in trust for the use and benefit of this plaintiff to the extent of its interest therein, as shown by and in accordance with the escrow agreement hereinbefore set forth, and for general relief.

The transaction set forth constituted a delivery to the bank in escrow. (*Cannon v. Handley*, 72 Cal. 133, [13 Pac. 315]; *McDonald v. Huff*, 77 Cal. 279, [19 Pac. 499].) As appears by the paragraph of the agreement designated "3," defendant was entitled to a delivery of the deeds only in the event that plaintiff should fail or neglect, within thirty days after service upon it of the notice in writing therein prescribed, to pay or deposit with the bank ten thousand dollars. Notwithstanding this fact, defendant upon serving the notice of September 1, 1908, by means of false representations, obtained possession of the deeds and withdrew them from the depositary of September 25, 1908. Defendant had no right to withdraw from the depositary its own deed, much less the quitclaim deeds designated in the agreement as Nos. 1 and 2, before the expiration of the time fixed for the happening of the event, or performance of the condition upon which they were to be delivered. (*McDonald v. Huff*, 77 Cal. 279, [19 Pac. 499]; *Grove v. Jennings*, 46 Kan. 366, [26 Pac. 738]; 11 Ency. of Law, p. 344.) If it is conceded that since deed No. 3 from defendant to plaintiff was never delivered to the latter, by reason of which fact defendant was never divested of its title to the land, and hence as to the interest therein described no trust could arise in plaintiff's favor, it is equally clear that there was no valid delivery of deeds Nos. 1 and 2, which purported to convey to defendant the interest of plaintiff in the land; hence defendant, at least as to such interest, would be deemed to hold the same in trust for plaintiff. For the injury thus sustained, as shown by the complaint, plaintiff was entitled to appropriate relief. The court

did not err in overruling the general demurrer interposed to the complaint.

By its answer, containing much unnecessary matter that should be disregarded as surplusage, defendant, among other things, admitted the execution of the agreement, deposit of the deeds in escrow, and the giving of the notice of September, 1. 1908, as stated in the complaint, and alleged that at the time of entering into the agreement defendant was in possession of the lands, which were a part of the public domain, under a mineral entry as oil lands, which fact was known to plaintiff; that a judgment had been entered in defendant's favor by the superior court of Kern County in an action brought by one Clark against defendant to determine conflicting rights to such lands, from which judgment Clark had appealed to the supreme court; that prior to November 5, 1904, defendant procured a dismissal of the judgment so entered in defendant's favor and from which Clark had appealed; that on November 5, 1904, defendant caused to be served upon plaintiff a copy of the *remittitur* issued out of the supreme court showing the dismissal of said appeal, whereby plaintiff was notified of the final determination of said action in favor of defendant, a copy of which *remittitur*, together with an affidavit showing service thereof upon plaintiff on November 5, 1904, was, on the eighth day of December, 1904, served upon said bank as escrow-holder; that plaintiff did not within thirty days after the service of such notice, or at any other time, pay to said bank the sum of ten thousand dollars provided to be paid under the terms of said agreement; that at the time of depositing the deeds and agreement in escrow with the bank there was indorsed upon the envelope wherein the same were inclosed, and signed by both plaintiff and defendant, a memorandum as follows: "Notice of decision of supreme court acknowledged by Doran, Brouse & Price, to be filed with the bank to determine the maturity of this escrow." All of these allegations were conclusively proved and in substance found by the court to be true. The court further found that at no time did defendant furnish or present to plaintiff, or to the bank, any certificate of title showing that title to the property was vested in defendant free and clear of encumbrances, and that defendant did represent to the bank that plaintiff, since

it had not theretofore paid defendant or said bank the sum of ten thousand dollars, no longer had any interest in the subject matter of the escrow, by reason of which fact defendant was entitled to a delivery of the deeds, and that notwithstanding plaintiff's protest made to the bank, to the effect that defendant had failed to comply with its part of the agreement in that it had failed to furnish such certificate of title, and in disregard of such failure so to furnish the same, said bank did surrender and deliver the deeds and agreement to defendant. As a conclusion of law, the court found that plaintiff was entitled to have the deeds so deposited in escrow remain undisturbed until thirty days after defendant had tendered to plaintiff a good and sufficient deed conveying, free and clear of encumbrance, the title in fee simple to the property in question, together with certificate of title showing same to be vested in the defendant in fee simple, free and clear of encumbrances; that notwithstanding such fact, defendant unlawfully obtained from the escrow-holder the said deeds in contravention of the rights of plaintiff under the terms and conditions of such escrow. The correctness of this conclusion, predicated upon the findings referred to, depends upon an interpretation of the terms of the contract.

It is apparent that the trial court construed the agreement as requiring defendant, as a condition of withdrawing the deeds, to furnish to plaintiff a certificate showing title in fee to be vested in defendant free and clear of all encumbrances. In our opinion, this interpretation is not warranted by the language used in the agreement. As we view the contract, there was no promise on the part of defendant to furnish a certificate of title, and no promise on the part of plaintiff to pay the ten thousand dollars, *unless* it was furnished. Under the provisions of paragraph designated "1," the obligation on the part of the plaintiff to pay the ten thousand dollars was upon the condition that defendant performed the acts therein specified, none of which, however, did defendant promise or assume any obligation to perform, the agreement in this respect being unilateral. Paragraph 2, having reference to and predicated upon the performance of acts on the part of defendant as specified in paragraph 1, and upon the doing of which an obligation would be imposed upon plaintiff to pay the sum specified, further provided that

upon the making of such payment by plaintiff the bank should deliver to it the deed and certificate of title specified in paragraph 1. Defendant, however, did not perform the conditions specified as a prerequisite to compelling plaintiff to pay the purchase price. Under these circumstances, plaintiff being free from obligation to make the payment, defendant invoked the provisions of paragraph 3 under which, upon complying with the terms thereof, plaintiff was required to either pay the ten thousand dollars or have the deeds delivered to defendant. It thus appears that by the terms of the agreement two distinct rights were conferred upon defendant: 1. It might, by complying with the provisions of paragraph 1, since plaintiff promised to pay the ten thousand dollars upon defendant doing the acts therein mentioned, impose upon plaintiff an obligation to pay the sum specified, for the recovery of which an action would lie against it; and, 2. Waiving such right by failure to perform the conditions therein contained, and plaintiff by reason of such nonperformance being free from any obligation to pay the ten thousand dollars, defendant might proceed under the terms of paragraph 3 whereby it could, by giving the notice therein specified, require plaintiff to pay the ten thousand dollars within thirty days from the service of such notice, or, in the event of plaintiff's failure so to do, rightfully demand from the bank a delivery of the deeds to which, by reason of such default on the part of plaintiff, it was entitled. The difference in the two provisions as to plaintiff is that in the one case performance by defendant of the conditions specified in paragraph 1 imposed upon plaintiff a *legal obligation enforceable* in an action at law to pay the ten thousand dollars, while in the other it *had the option* to pay or have the deeds withdrawn. In other words, since defendant did not do the acts specified in paragraph 1, the transaction, under the notice given on November 5, 1904, constituted a simple escrow whereby defendant was entitled to a delivery of the deeds by the bank for failure of plaintiff to pay ten thousand dollars within thirty days from service of the notice. Not only was it the duty of the bank, under the terms of paragraph 3, to deliver the deeds to defendant upon demand therefore, accompanied with proof of service of the notice, but any doubt as to such duty is removed by the memorandum

indorsed on the envelope containing the deeds and signed by the parties, to the effect that proof of service made upon plaintiff that the supreme court had affirmed the Clark judgment should mature the escrow.

We think it clearly appears from the language of the contract that it was the intention of the parties that, while defendant could not enforce specific performance of the contract by compelling the plaintiff to pay the ten thousand dollars without a title based upon a patent, it could, upon the Clark judgment in its favor being affirmed by the supreme court, without showing title in fee vested in it, insist that plaintiff should accept the deed as conveying such title as it possessed and pay therefor the sum of ten thousand dollars; or, in the event of its failure so to do, insist upon its right to have the deeds held by the bank delivered to it.

This view of the contract renders it unnecessary to discuss the technical points urged by appellant for a reversal. Since defendant was not required to furnish to plaintiff a certificate of title, or give the notice alleged to have been given on September 1, 1908, it follows that the findings of its failure to furnish such certificate and the withdrawal of the deeds in less than thirty days after the giving of said last mentioned notice—being findings as to immaterial matters—are insufficient to support the judgment.

The judgment and order denying defendant's motion for a new trial are reversed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1413. Second Appellate District.—January 6, 1914.]

LESLIE INGALLS, Appellant, v. MONTE CRISTO OIL & DEVELOPMENT COMPANY (a Corporation), Respondent.

MASTER AND SERVANT—FALL BY EMPLOYEE FROM WALKING-BEAM OF OIL DERRICK—COLLAPSE OF ROOF—INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.—In this action by an employee for injuries sustained by a fall from a walking-beam on an oil derrick by reason of the collapse of the roof of the derrick, an instruction on the subject

of contributory negligence, which refers to a defective condition of the roof but does not directly affirm that the roof was defective or dangerous, is not open to the objection, when construed with other instructions, that it assumes the defective construction and dangerous condition of the roof and thereby invades the province of the jury.

ID.—CAPACITY FOR UNDERSTANDING PERIL—INSTRUCTIONS.—An instruction in such action that the question as to the plaintiff's alleged contributory negligence must be determined in the light of his capacity for understanding the peril, is not erroneous when the evidence shows without conflict that at the time of the accident the plaintiff was in good health and his general faculties as to memory and otherwise were excellent.

ID.—CONTRIBUTORY NEGLIGENCE—INSTRUCTION OMITTING—OTHER INSTRUCTIONS AIDING.—In such action an instruction to the jury that if they find certain facts, then the plaintiff is entitled to a verdict, is not erroneous because it omits to include the question of contributory negligence, where other instructions are given which fully state the law as to contributory negligence.

ID.—INSTRUCTIONS—CONSIDERATION AS A WHOLE AND NOT SEPARATELY. Instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed.

ID.—INJURY TO EMPLOYEE—PRESUMPTION OF NEGLIGENCE FROM HAPPENING OF ACCIDENT.—Where the relation of the parties is that of employer and employee, it is not the universal rule that the happening of the accident is not itself a circumstance tending to show negligence on the part of the defendant. In this action by an employee for injuries sustained by a fall from a walking-beam on an oil derrick by reason of the collapse of the roof of the derrick, the falling of the roof, when the derrick and apparatus were being used in the ordinary and in a proper way, *prima facie* established negligence, although it appears, from such casual observations as had been made, that no defectiveness or insecurity of the roof or its fastenings had been observed, but it also appears that no recent inspection had been made for the direct purpose of ascertaining whether the derrick was in a safe condition.

ID.—SAFE APPLIANCES FOR EMPLOYEE—DUTY OF EMPLOYER TO MAINTAIN.—The employer was not excused by the mere fact that the derrick had been constructed in the usual manner and presumably once was in safe condition; his duty was to use due care to main-

tain that safe condition and guard against the wear and tear of use or of time alone.

ID.—EVIDENCE—SUFFICIENCY TO SUSTAIN RECOVERY BY EMPLOYEE FOR PERSONAL INJURIES.—The evidence in this case tends to show that the plaintiff fell from his place on the walking-beam by reason of being struck by the falling roof; that the roof fell by reason of some defect in its fastening, the exact nature of which defect is not explained; that under the circumstances shown the jury were justified in finding that the plaintiff received his injuries by reason of negligence of the defendant, as charged in the complaint, and without negligence on the part of the plaintiff or his coemployees.

APPEAL from an order of the Superior Court of Kern County granting a motion for a new trial. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Matthew S. Platz, and R. H. Wilson, for Appellant.

Henry Ach, Geo. E. Whitaker, T. E. Pawlicki, Hunsaker & Britt, and Rowen Irwin, for Respondent.

CONREY, P. J.—Appeal from an order granting defendant's motion for a new trial. On the twenty-second day of February, 1908, and for some time prior thereto, the plaintiff was in the employ of the defendant at its oil wells in Kern County, and was working in the capacity of a well puller. On the day above mentioned, and while engaged in the pulling of a certain well of the defendant, it was, as the evidence shows, necessary for the plaintiff to stand on a walking-beam within a derrick and connected with the machinery then being used by the plaintiff and other men so engaged. While plaintiff was so standing on said walking-beam the roof of said derrick fell and at the same moment the plaintiff fell from the walking-beam and received the injuries of which he complains. The complaint alleges that the roof, by reason of its imperfection, defectiveness, unsafeness, and inadequacy of construction, became loose, unfastened, caved in, and suddenly and without warning fell and in so falling struck the plaintiff with such force that it knocked him off from said walking-beam and thereby caused said injury. It is further alleged, that plaintiff had no

warning, notice, or knowledge of the unsafeness or dangerous condition of said roof prior to the falling and caving in of the same. The answer of the defendant denies said alleged facts with reference to the condition of the roof and the cause of falling thereof, and denies that it struck plaintiff with such force that it knocked him off from said walking-beam or caused him to fall; and denies that plaintiff had no warning or notice or knowledge of such alleged conditions. The answer further alleges that plaintiff's injuries, if any, were caused entirely by and through the negligence of plaintiff in performing the duties of his said employment; and further separately alleges, as an additional separate defense, that plaintiff's injuries, if any, were caused by and through the negligence of plaintiff's fellow-servants and coemployees.

Judgment having been entered on a verdict in favor of plaintiff, and the defendant having moved for a new trial upon grounds including those which are to be discussed herein, the superior court made its order granting said motion for a new trial. In said order it was specified that the motion was granted solely on account of error of the court in giving certain instructions noted as plaintiff's instructions 6, 7, 9, and 14. These instructions are as follows:

"6. The court instructs you that the plaintiff cannot be deemed to have been in fault because he failed to take precaution that he did not know to be necessary as a reasonably prudent and observing man; and he cannot be denied a recovery on the ground of contributory negligence unless you believe from the evidence he knew or ought to have known the defective and dangerous condition of the roof, rendering his act an imprudent one, considered in the light of his duties as a well puller being engaged in those duties at the time of the injury."

"7. Contributory negligence is not established unless you find plaintiff was chargeable with a knowledge, or ought to have known not only of the defective conditions, but also of the dangers of those conditions, and this conclusion is to be drawn in the light of the duties of plaintiff, his opportunities of observation, time for observation and capacity for understanding the peril."

"9. You are instructed that in case you find the defect in the condition of the roof was concealed, or if the plaintiff

had nothing to do with its construction, and from the character of his employment was not presumed to know of its defective condition, then he cannot be charged with knowledge of the existence of such defects simply because he was required to work near such defective roof."

"14. If you believe from the evidence that plaintiff sustained injury from a fall from the walking-beam at this well, by reason of the collapse of the roof over the same, knocking him off, or causing him to fall while the plaintiff was in the discharge of his duties as a well puller, and that such duties had nothing to do with the construction or repair of said roof, then the burden of proof is on the defendant to show that the plaintiff knew or ought to have known of such defect in the roof and the danger because of such defect."

In granting the motion for a new trial the superior court held that it had erred in that in said four instructions it had assumed the defective construction and dangerous condition of the roof and had thereby invaded the province of the jury. The instructions are to be considered in the light of the fact that they were given as a statement of the law governing contributory negligence, and that they would not be applicable to the case unless the evidence established that the defendant was negligent. Since the said four instructions do not in any of their terms directly state as a fact that the roof was in a defective or dangerous condition, we may look to the other instructions to see whether these assumptions of which the defendant complains did in reality amount to an instruction that the condition of the roof was defective or dangerous. The court told the jury in other instructions that before the plaintiff can recover he must show that the derrick or the roof thereof was defective and unsafe; and also must show that he did not have the means of knowing the defect, *if any existed*, as did the defendant. Also the court stated to the jury that, unless the jury found that the plaintiff had a preponderance of the evidence in support of the fact that the defendant was guilty of negligence in the manner charged in the complaint, and that such negligence was the proximate or direct cause of plaintiff's injury in question, the plaintiff could not recover; also that "if the derrick was reasonably suitable and safe for that work at the time of the accident, then your verdict should be for the defendant."

The four instructions first above mentioned would have been much improved as to clearness of statement if in each instance of reference to a defective condition of the roof, there had been a phrase with conditional words qualifying the reference made. But the absence of such phrases does not necessarily turn the instructions into instructions charging the jury with respect to matters of fact. As they do not directly affirm that the condition of the roof was defective or dangerous, they may be construed in harmony with the other instructions which clearly leave these facts to be determined by the jury.

Plaintiff's instruction 7 declares that the question as to plaintiff's alleged contributory negligence must be determined "in the light of . . . his . . . capacity for understanding the peril." Defendant claims that this instruction is erroneous because defendant had a right to presume that the plaintiff was a person of normal capacity for understanding and appreciating dangers. It is true the respondent was entitled to such presumption under the facts shown in this case, and also that the evidence shows without conflict that at the time of the accident the plaintiff was in good health and that "his general faculties as to memory and otherwise were excellent." But this fact so shown destroys the force of the objection made to the instruction. In connection with such established fact, it was no more than a statement that the question whether plaintiff ought to have known of the defective conditions must be considered in the light of his excellent mental capacity. It is not easy to see that the defendant suffered any injury by virtue of this alleged error.

It is contended on behalf of defendant that instruction 2 given by the court is erroneous because it tells the jury that if they find certain facts, then the plaintiff is entitled to a verdict; and that the court thus instructed in favor of the plaintiff regardless of whether the defendant knew or ought to have known of the unsafe and dangerous condition of the roof, and also regardless of the fact as to whether plaintiff did not have the same means of knowledge of the defect, if any existed, as did the defendant. It is further claimed that the instruction is erroneous because in conflict with instruction No. 4, which was a full statement, including these

elements omitted from instruction 2. We are of opinion that instruction 2 is aided, rather than destroyed, by instruction 4. A similar situation with regard to instructions was under review in *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, [34 Pac. 618, 36 Pac. 407]. There the court instructed that if the jury believed certain facts their verdict should be for the plaintiff, and omitted to include the question of contributory negligence on the part of the plaintiff. In response to the claim that the judgment should be reversed for this reason, the court pointed out that other instructions given in the case fully stated the law as to contributory negligence. "It is sufficient to say that the rule is well settled here that instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed. (Citing cases.) Tested by this rule, we do not think the particular instruction complained of could possibly have misled the jury." The foregoing decision is approved in *Henderson v. Los Angeles Traction Co.*, 150 Cal. 689, [89 Pac. 966], wherein at page 699, the rule is clearly re-stated. The distinction between these decisions and cases where a conflict in the instructions constitutes reversible error is pointed out in *Parkin v. Grayson-Owen Co.*, 157 Cal. 41, 49, [106 Pac. 210]. See, also, *Rathbun v. White*, 157 Cal. 249, 253, [107 Pac. 309].

The respondent further contends that the order granting a new trial should be sustained upon the ground that the evidence is without conflict upon the subject of defendant's negligence and wholly fails to prove any negligence on the part of defendant. Respondent claims that there is no evidence to show that the roof of the derrick struck the plaintiff, or that the roof was imperfect, unsafe, or of faulty construction, or that it fell by reason of any such faulty construction, or that the imperfection and defectiveness of the roof were caused by or due to the negligence of the defendant. The argument is that the testimony merely proves that

the roof fell and that the plaintiff at the same time fell and was injured.

It is true that no one has directly testified that the roof struck the plaintiff. According to his own testimony, plaintiff does not remember anything about the accident, or even the fact of his having been there when it occurred. He does remember that prior to that time he was working for the defendant in the well-pulling gang. The most important element in his claim for damages consists in the injury to his head and the impairment of his mental faculties. The two other men who were present when the plaintiff was injured were so occupied at the moment of the accident that they did not actually see the roof fall. Hearing an unusual noise, they glanced upward and saw the plaintiff falling from the beam. After taking care of him, they found that a corner of the roof had fallen down and was lying on the beam where the plaintiff had stood. The facts shown with respect to the condition of the roof and derrick, as found immediately after the accident, indicate that there was no breaking of any timbers, but that the roof fell because of the giving way of certain nails driven through the end of the ridge pole and into the derrick timbers. There is no direct evidence as to whether the nails gave way by reason of their insufficient holding capacity at the time, or by reason of some pushing or pulling force. The derrick was several years old at that time. Mr. Tooker, who testified as a witness for defendant, was foreman for the defendant in that oil field and had been foreman there for eight or nine months. He says that during that period of time he had been in and around well No. 12, at which this accident happened, and as such foreman was inspecting the property to see that it was in proper condition. He does not know the exact condition of that derrick and that rig on that day. It does not appear that he ever made any particular inspection of that derrick or roof, and the time of any inspection that he made is not fixed, except that it was sometime within the eight or nine months that he had been so employed. He says that if there was any defect or imperfection in the derrick or in the roof, he did not know anything about it. The witnesses Starkey and Senter, who were working with plaintiff at the time of the accident, say that if they or the plaintiff had discovered

any defects which in their opinion rendered the derrick unsafe, it was a part of their duty to report that matter to the defendant. The evidence also shows that the plaintiff was employed merely as a well puller. The witnesses do not testify that it was his duty or a part of his employment to make inspections for the purpose of discovering defects in the derrick. Mr. Tooker, the foreman, says that on this occasion, on the twenty-second day of February, the men were not directed to do any repair work; that they did not go to that well with directions from him to do anything aside from pulling that well. Tooker also testified: "The only repairs that I had ever made on the derrick were in regard to the engine and the running repairs in the jack post. I believe I patched the walking-beam at one time. I do not know anything about any repairs being made to this roof at any time. This well was pumped ever since it was completed; ever since it was drilled and brought in, something like seven or eight years before this accident."

Counsel for the defendant, in support of their claim that the facts shown by the evidence in this case are not sufficient to support the plaintiff's cause of action, refer to a number of decisions where it has been held that the mere happening of an accident and injury to an employee does not raise any presumption that the employer is guilty of actionable negligence. Most of these cases relate to accidents caused by the breaking or faulty operation of appliances furnished for use in the employee's task. Others relate to accident caused by an unsafe condition of the place in which the employee was directed to work. The case at bar belongs to the latter class. The two principal cases of this class in California, to which our attention has been referred by the respondent, are *Thompson v. California Construction Co.*, 148 Cal. 35, [82 Pac. 367], and *Pre v. Standard Portland Cement Co.*, 9 Cal. App. 591, [100 Pac. 122]. In the first of these two cases the plaintiff was injured by a sliding rock on a hillside where he was engaged in moving rock and earth. In the other of these two cases the plaintiff was injured by the caving down upon him of a heated pile of clinkers which it was his business to remove from the place where they were stored. It was held in these cases that where the dangers complained of may to some extent arise from the changed conditions

made by the servant himself in the progress of the work, he is under as much obligation as is the master to be on the lookout for such dangers. There being no evidence of negligence of the defendant other than that the rock slipped down in the one case, and that the clinkers caved down in the other, it was held that the mere happening of the accident was not *prima facie* evidence of neglect on the part of the master.

But even where the relation of the parties is that of employer and employee, it is not the universal rule that the happening of the accident is not itself a circumstance tending to show negligence on the part of the defendant. In *Madden v. Occidental etc. Co.*, 86 Cal. 445, [25 Pac. 5], although the decision of the supreme court in that particular case was in favor of the defendant, the court took occasion to say: "It may be that in some cases it would be sufficient to prove that an accident occurred, in order to establish a *prima facie* case of negligence, and cast upon the defendant the burden of explaining away the inference resulting from such proof; and it may be conceded that such would have been the case here, if it had been shown that the sling was being properly used by the coemployees of the deceased, and in the ordinary way." The court quoted *Griffin v. Boston etc. R. R. Co.*, 148 Mass. 143, [12 Am. St. Rep. 526, 1 L. R. A. 698, 19 N. E. 166], thus: "No general rule can be laid down that the mere occurrence of an accident is or is not sufficient proof of actionable negligence; for each case must depend upon its own circumstances."

In the case at bar the evidence indicates that the derrick and machinery were being used by the plaintiff and his coemployees in the ordinary and proper way; and there is no evidence to the contrary.

While it is true that from such casual observations as were made no defectiveness or insecurity of the roof or its fastenings had been observed, it also appears that no recent inspection had been made for the direct purpose of ascertaining whether the derrick was in a safe condition. The defendant is not excused by the mere fact that the derrick had been constructed in the usual manner and presumably once was in safe condition. Its duty was to use due care to maintain that safe condition. It is no answer to a charge of negligence to say that four years ago I constructed that appliance, and

it was then in perfect condition. The wear and tear of use, or of time alone, should be guarded against by the exercise of some degree of care upon the part of the employer." (*Russell v. Pacific Can Co.*, 116 Cal. 527, 531, [48 Pac. 616]. See, also, *Jager v. California Bridge Co.*, 104 Cal. 542, [38 Pac. 413].)

The principle here relied on by the defendant is expressed in the maxim *res ipsa loquitur*. In Labatt on Master and Servant (2d ed.), section 1601, page 4864, the author says: "The rationale of this doctrine is that, in some cases the very nature of the action may, of itself, and through the presumption it carries, supply the requisite proof. It is applicable where, under the circumstances shown, the accident presumably would not have happened if due care had been exercised. Its essential import is that, on the facts proved, the plaintiff has made out a *prima facie* case, without direct proof of negligence." In *Mulcairns v. City of Janesville*, 67 Wis. 24, [29 N. W. 565], it was shown that an employee of the city was killed by the unexplained falling of the wall of a cistern. The city was constructing the cistern and the deceased had been ordered to work near the base of said wall. The court held that the falling of this wall of its own weight or by the pressure of gravel and earth behind it, placed there by the city, was *prima facie* evidence of the negligence of the city. "Why did it fall? If it had been properly constructed, it is common observation, and within the common course of things, that it would not have fallen; therefore it was not properly constructed; and it was negligently constructed, because by the exercise of ordinary care and prudence, such a wall would have been so constructed that it would not have fallen, but would have stood alone. The city, in such a case, may well be called upon to explain the reason why; for the knowledge of the manner of the construction of its work is peculiarly in the city and its agent, for they constructed the wall. The city must, by proof, repel and overcome this natural presumption." In *Solarz v. Manhattan Ry. Co.*, 8 Misc. Rep. 656, [29 N. Y. Supp. 1123] affirmed, 11 Misc. Rep. 715, [32 N. Y. Supp. 1149] and 155 N. Y. 645; [49 N. E. 1104]), where a laborer was injured by the breaking of a scaffold board, it was held that the fact that the scaffold gave way was *prima facie* evidence

of negligence. After citing other decisions, the court said: "Upon these authorities, the unexplained breaking down of the scaffold made out a case sufficiently strong to go to the jury on the subject of negligence."

It is our opinion that the evidence in this case, and to which we have referred, tends to show that the plaintiff fell from his place on the walking beam by reason of being struck by the falling roof; that the roof fell by reason of some defect in its fastening, the exact nature of which defect is not explained; that under the circumstances shown the jury had a right to find that the plaintiff received his injuries by reason of negligence of the defendant, as charged in the complaint, and without negligence on the part of plaintiff or his coemployees.

The order granting a new trial herein is reversed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on January 27, 1914; and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 6, 1914.

[Civ. No. 1452. First Appellate District.—January 7, 1914.]

EDWARD FUNKENSTEIN et al., Petitioners, v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO et al., Respondents.

EVIDENCE—COMPELLING PRODUCTION OF BOOKS AND PAPERS—CONDITIONS PRECEDENT TO ORDER.—By reason of the constitutional guaranty against unreasonable seizures and searches, it is a condition precedent to the right of a court, acting under section 1000 of the Code of Civil Procedure, to require a person to deliver up for examination his private books and papers, that such person has a book, paper, or document containing evidence material to the issues before the court, and that the precise book, paper, or document containing such evidence be designated or so described that it may be identified.

ID.—INSUFFICIENT AFFIDAVIT FOR INSPECTION OF BOOKS—CONTEMPT IN REFUSING TO COMPLY WITH ORDER—PROHIBITION.—Where the affidavit, which is made the basis of an order requiring the defendant in an action to quiet title to permit an inspection of books and documents by the plaintiff, fails to show that the defendant has in his possession any particular book, paper, or document which, if presented at the trial, would be admissible and material evidence for either of the parties to the action, and also fails to sufficiently identify any such book, paper, or document with the particularity required for compliance with the constitutional guaranty against unreasonable searches and seizures, prohibition will issue to prevent the court from punishing the defendant for contempt in refusing to comply with an order of inspection.

APPLICATION for Writ of Prohibition to be directed to the Superior Court of the City and County of San Francisco.

The facts are stated in the opinion of the court.

Leon Samuels, Edgar D. Peixotto and J. R. Pringle, for Petitioners.

George Lezinsky, for Respondents.

THE COURT.—The case of Arturo Wolf and Marie Julia Wolf versus Charles Funkenstein Gall, Rebecca Funkenstein Gall, Edward Funkenstein, and Sarah Funkenstein, pending in the superior court of the city and county of San Francisco, state of California, is in form an action to quiet title to certain interests in real property in said city, of which it is averred in the complaint that one Tobe Funkenstein died seized on June 28, 1913, leaving the parties to said action as her heirs at law, and as such entitled to their respective undivided interests in said property. The defendants deny that the plaintiffs have any interest in said real estate, and assert two sources of title in themselves, viz: 1. A deed of gift from said Tobe Funkenstein to said defendants dated December 21, 1907; and 2. Title by adverse possession. The case being at issue upon these averments of the respective parties, and about to go to trial, the plaintiffs moved the trial court for an order directing the defendant Edward Funkenstein, who is also the agent of the other defendants in respect to said property, to give to plaintiffs an inspection of certain books, papers, and documents referred to in the affidavit of their counsel, George Lezinsky, accompanying the

notice of said motion. The court granted the motion; whereupon the defendants refused to comply with said order, and took and perfected an appeal from the same. Thereafter and on November 21, 1913, the judge of the trial court issued an order to show cause why the said defendant, Edward Funkenstein, should not be punished for contempt in failing and refusing to comply with said order of inspection; and said court, being about to proceed upon said last named order and punish said Edward Funkenstein for contempt, the pending application for a writ of prohibition was presented to this court.

This court is of opinion that the writ of prohibition should issue. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches," is inviolable under section 19 of article I of our state constitution; which section also provides that "no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

The supreme court, in *Ex parte Clark*, 126 Cal. 235, [77 Am. St. Rep. 176, 46 L. R. A. 835, 58 Pac. 546], and the court of appeal in *Kullman v. Superior Court*, 15 Cal. App. 276, [114 Pac. 589], have given express application of this constitutional guarantee to proceedings under section 1000 of the Code of Civil Procedure, holding "that in such a proceeding the essential facts must be made to appear by clear and unequivocal proof as a condition precedent of the right of a court to require a person to deliver up for examination his private books and papers, viz.: (1) that such person has a book, paper or document containing evidence material to the issues before the court; (2) that the precise book, paper or document containing such evidence be designated or so described that it may be identified. The last mentioned requisite is in point of importance equal with, or if there is any difference, paramount to the first, for, however much proof may be adduced of the materiality of the evidence, the constitutional right of the people to be protected against the unlawful seizure of their private documents forecloses authority in the courts to order a general or indiscriminate ransacking of one's private papers or documents as the means for locating the desired evidence." (*Kullman v. Superior Court*, 15 Cal. App. 276, [114 Pac. 589].)

When the affidavit which was made the basis of the order of inspection of the trial court, and upon which the jurisdiction of that court in the premises must be predicated, is examined in the light of the constitutional guarantee as thus construed and applied, it is found to fail in measuring up to the required standard in two essential respects. In the first place, the said affidavit fails to show that Edward Funkenstein has in his possession any particular book, paper, or document which, if presented at the trial, would be admissible and material evidence for either of the parties to said action; and in the second place, said affiant fails to sufficiently identify any such book, paper, or document with the particularity required for compliance with the constitutional provision. The particular vice of the affidavit in question is that it refers in each instance to books, papers, and documents made by or drawn or given to or in the names of "the owner or owners of the property"; but the question as to who the owner or owners of the property may be is the very matter in dispute in this action. If the affiant intends by this phrase to refer to the plaintiffs, and is to be understood as deposing that Edward Funkenstein is in possession of any book, paper, or document containing entries, receipts, payments, or agreements running in the names of the plaintiffs in the action, and tending in any material way to show in them an actual or admitted interest in the property in question or in its proceeds after the death of Tobe Funkenstein, the affiant should have so expressly stated; or, if the affiant is to be understood as claiming that any such book or paper in the possession of Edward Funkenstein contains specific matter, tending to show that after the date of the alleged deed of gift from Tobe Funkenstein to the defendants, she still retained her interest in said property up to the time of her death, notwithstanding said deed, the affiant should have expressly set forth that fact in his affidavit. On the other hand, if the books, papers, and documents in the possession of Edward Funkenstein contained entries, receipts, writings, or agreements relating to said property or the proceeds thereof, in the names only of the defendants to the action, and made, issued, taken, or drawn by them or by their agent on their behalf, such books, papers, or documents would reasonably contain no material evidence in aid of the plaintiff's case and no admissible evidence in support

of the defendant's claim of title; or, if any of such books, papers, or documents so made, issued or taken would be admissible upon any theory of the case it was the duty of the affiant to set forth the facts and reasons showing wherein their materiality and admissibility consist; and it was not sufficient in his affidavit to merely rely upon the legal conclusion stated in general terms that such books, papers, and documents would be material.

Finally, the entire failure of the affiant to identify with any particularity of description any specific book or paper or document constitutes, in our opinion, a fatal objection to the jurisdiction of the trial court to make the order in question, or to further proceed to punish the said defendant for its violation. The mere fact that a party seeking an inspection of private papers in the possession of another is unable to specify the particular thing to which he desires access, does not justify a departure from the strict requirement of the constitution; but even if in any case it could be held to do so, the plaintiffs in this case are in no position to plead their ignorance of detail as an excuse for the fatal generality of their affidavit; for it appears affirmatively and without denial that the deposition of Edward Funkenstein has been taken by the plaintiffs in this action, and it nowhere appears that he therein attempted any concealment of any fact respecting the books and papers in his possession about which the plaintiffs might need to be informed in order to the preparation of a proper affidavit as the basis for an order of inspection.

These views render unnecessary a consideration of the question as to the effect of defendants' appeal upon the jurisdiction of the trial court to further proceed with an enforcement of the order after the perfection of such appeal.

Let the writ issue as prayed for.

[Civ. No. 1448. Second Appellate District.—January 9, 1914.]

CITY OF HANFORD (a Municipal Corporation), Respondent, v. **D. C. WILLIAMS**, City Clerk of the City of Hanford, Appellant.

MUNICIPAL CORPORATION—MANDAMUS TO COMPEL COUNTERSIGNING BONDS—VALIDITY OF ELECTION—NONPREJUDICIAL ERROR IN COUNTING BALLOTS.—Where, on appeal by a city clerk from a judgment granting a peremptory writ of mandate commanding him to countersign certain municipal bonds, it appears that, conceding all the appellant claims as to the erroneous rulings of the court in counting the ballots voted for the issuance of the bonds, the election was carried by more than a two-thirds vote of the legal ballots cast, such erroneous rulings could not have affected the result and hence are not prejudicial to the appellant or ground for reversal of the judgment.

APPEAL from a judgment of the Superior Court of Kings County and from an order refusing a new trial. **J. A. Allen**, Judge presiding.

The facts are stated in the opinion of the court.

J. L. C. Irwin, for Appellant.

F. E. Kilpatrick, for Respondent.

SHAW, J.—The petition of plaintiff for a peremptory writ of mandate, commanding defendant as city clerk to countersign eighty municipal bonds therein described, was granted. Defendant appeals from the judgment and an order denying his motion for a new trial.

The court found that, for certain reasons stated, a number of the ballots cast, both for and against the issuance of the bonds, were not entitled to be counted; that of the number of ballots voted at the special election held for submitting to the electors of the city of Hanford the question of the issuance of the bonds, 813 thereof were legal and valid, and of the legal ballots so cast whereby the voters gave expression to their choice as to whether or not the bonds should be issued, 543 thereof were in favor of the issuance of the bonds and 267 were opposed to the proposed issuance thereof. Of the

twelve ballots excluded from the count by the court, appellant attacks the ruling of the court only as to seven thereof, thus conceding the ruling in excluding the other five ballots to be correct. Of these seven ballots which he insists should have been counted, four were voted in opposition to the issuance of the bonds, and three were in favor of the issuance thereof. Hence, if the court had not committed the alleged errors, but had counted the seven ballots exactly as appellant insists it should have done, it would have added four votes to the 267 counted against the bonds, making a total of 271 votes opposed to the proposition, and added three votes to the 543 cast in favor thereof, making a total of 546 votes in favor of the issuance of the bonds. It thus appears that, conceding all that appellant claims, the bonds were carried by a vote of more than two-thirds of the legal ballots voted at the special election submitting the proposition to the voters of the city. Conceding, therefore, that the court erred in its rulings as claimed by appellant, it is apparent that defendant's rights were not prejudiced by reason of such rulings. Had the rulings been otherwise, such fact could not have affected the result. "No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect, had not occurred or existed." (Code Civ. Proc., sec. 475.) While there is a difference of three votes in the number of ballots found by the court to have been actually cast and the total number of votes as found by the court to have been cast for and against the proposition, we cannot presume that the three votes thus unaccounted for in the findings were in fact cast in opposition to the proposition; on the contrary, every intendment being in favor of the judgment, we must assume that they were favorable, rather than otherwise, to the issuance of the bonds. As presented by counsel for appellant, the appeal is wholly without merit.

The order and judgment are, therefore, affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1466. Second Appellate District.—January 9, 1914.]

J. L. STARR, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

JUSTICE'S COURT—APPEAL TO SUPERIOR COURT—TIME FOR FILING UNDERTAKING—EXPIRATION ON SATURDAY.—Where the last day for filing an undertaking on an appeal from a justice's court falls on Saturday, which from 12 o'clock noon is a holiday, filing the undertaking on the Monday following is too late, and the superior court cannot entertain jurisdiction of the appeal.

ID.—HOLIDAYS—EFFECT OF STATUTE DECLARING SATURDAY A HALF HOLIDAY.—The effect of the statute declaring Saturday from 12 o'clock noon to be a half holiday is to shorten in number the hours of that day during which an act required to be performed shall be done. Up to noon Saturday is a business day, the same as any day other than those designated in section 10 of the Code of Civil Procedure as holidays, and the fact that the business day ends at noon does not extend the time for performance of an act where the time therefor expires on such shorter day.

PETITION for Writ of Prohibition to be directed to the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

Thorpe & Widney, for Petitioner.

W. J. Hittson, and Cleveland Schultz, for Respondents.

SHAW, J.—Petitioner filed an original petition in this court wherein he asked for a peremptory writ of prohibition to be directed to the Superior Court of Los Angeles County, commanding it to desist from proceeding further with the trial of a certain case therein pending, wherein the Knox Auto & Wagon Manufacturing Company is plaintiff, and petitioner is defendant, other than to grant petitioner's motion for a dismissal of the appeal therein. An alternative writ was issued, in response to which a general demurrer has been interposed to the petition.

It appears from the petition that judgment was rendered in said action in petitioner's favor by a justice of the peace. Plaintiff, the Knox Auto & Wagon Manufacturing Company,

appealed to the superior court, filing an undertaking, to the sufficiency of the sureties upon which defendant, on the third day of November, 1913, duly excepted. Thereupon the attorney for plaintiff in said action gave notice that the sureties on said undertaking, to the sufficiency of whom defendant had excepted, would, at 9:30 o'clock A. M., November 8, 1913, qualify before the justice who had tried the case. Notwithstanding the giving of said notice, the sureties upon said undertaking did not appear at the time and place specified, nor did any other sureties appear or qualify at such time or at all, on the eighth day of November, 1913. Thereafter, on Monday, November 10th, plaintiff in said action, for the purpose of perfecting its appeal, caused to be filed a new undertaking for the costs thereof, which undertaking the justice, in the absence of and without any notice to petitioner, approved and filed.

Thereafter, in the superior court, petitioner, as defendant in said action, moved the court to dismiss the appeal upon the ground that the undertaking was filed after the five days within which appellant was permitted under the statute to file the same, and that the filing of the undertaking on November 10, 1913, was ineffectual and insufficient to give the court jurisdiction to entertain the appeal. This motion was by the court denied for the reason, as stated by the court, that since the last day upon which the sureties could qualify, or plaintiff file a new undertaking, fell upon Saturday, which from 12 o'clock noon was a holiday, followed by Sunday, plaintiff was entitled to all of Monday, November 10th, on which to file its undertaking in perfecting the appeal. If the ruling is correct, it must follow that where the last day for the performance of an act, such as the filing of a demurrer, answer, or service of a paper, falls upon Saturday, such act need not be done on Saturday, but may be as effectually performed on the following Monday, the effect of which ruling is to declare all of Saturday a holiday. Clearly, this was not the intent of the legislature. The effect of the statute declaring Saturday from 12 o'clock noon to be a half holiday is to shorten in number the hours of such day during which the act required to be performed shall be done. Up to noon it is a business day, the same as any day other than those designated in section 10 of the Code of Civil Procedure, as holi-

days, and the fact that the business day ends at noon does not extend the time for performance of an act where the time therefore expires on such shorter day. The statute is peremptory in its terms and provides that upon a failure of the sureties to justify within the time fixed therefor, the appeal shall be regarded as though no undertaking had been given. (*McCracken v. Superior Court*, 86 Cal. 74, [24 Pac. 845]; *Wood v. Superior Court*, 67 Cal. 115, [7 Pac. 200].) It follows that the court had no jurisdiction to entertain the appeal, and it should have been dismissed.

It is, therefore, ordered that a peremptory writ of prohibition issue to the superior court of Los Angeles County, commanding it to desist and refrain from further proceedings in that certain action wherein the Knox Auto & Wagon Manufacturing Company is plaintiff, and petitioner is defendant, other than to grant defendant's motion for a dismissal of the appeal.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1437. Second Appellate District.—January 9, 1914.]

PACIFIC STATES CORPORATION (a Corporation), Appellant, v. RALPH ARNOLD, Respondent.

LANDLORD AND TENANT—ACTION FOR USE AND OCCUPATION—NECESSITY OF EXISTENCE OF CONTRACTUAL RELATION.—In an action for use and occupation of real property, the plaintiff is not entitled to recover unless he shows that the conventional relation of landlord and tenant exists.

ID.—RELATION OF LANDLORD AND TENANT—WHETHER IMPLIED FROM FINDINGS.—The existence of the relation of landlord and tenant is not to be implied from a finding in such action "that no written or verbal lease was executed by plaintiff to defendant of said premises, but that notice was given by plaintiff to defendant that defendant would be liable for the rental of said premises if he continued to use and occupy the same after May 1, 1911."

ID.—NOTICE OF LIABILITY FOR RENT—WHETHER SHOWS RELATION OF LANDLORD AND TENANT.—The fact that the plaintiff gave notice that the defendant would be liable for rent, in the absence of any

showing of assent on the part of the defendant, is insufficient to show the existence of any contractual relations between the parties, without which the plaintiff could not prevail in an action to recover rent.

ID.—APPEAL—INTENDMENTS IN SUPPORT OF JUDGMENT AND FINDINGS.—

Not only are all intendments on appeal in favor of the regularity of the action of the trial court, but the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon.

APPEAL from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Lloyd, Hunt, Cheney & Geibel, for Appellant.

Garfield R. Jones, and Jones & Bennett, for Respondent.

SHAW, J.—Action to recover rent at the rate of one hundred and seventy-five dollars per month for six months' use and occupation of real property. Judgment for defendant. Plaintiff appeals upon the judgment-roll claiming the judgment is not supported by the findings.

The court in substance found that on March 20, 1911, defendant, who was then the owner of the property, offered to sell it to one Merritt in consideration of twenty-five thousand dollars, and the right to use and occupy it until January 1, 1912, which offer Merritt declined; that thereafter defendant sold and conveyed the same in fee to Merritt for the consideration of twenty-five thousand dollars, but no agreement was made between Merritt and defendant whereby the latter was given the right to use and occupy the premises for any period whatsoever; that about May 1, 1911, plaintiff acquired title to the property, at which time defendant was in the open, notorious, and exclusive possession thereof under a claim of right to occupy the same until January first, as stated in his offer of sale to Merritt and so found by the court, but plaintiff had no notice of such claim; that the value of the use and occupation so had by defendant was seven hundred dollars, no part of which had been paid; "that no written or verbal lease was executed by plaintiff to defendant

of said premises, but that notice was given by plaintiff to defendant that defendant would be liable for the rental of said premises if he continued to use and occupy the same after May 1, 1911."

In the case of *Gregg v. Tamsen*, 42 App. Div. 138, [58 N. Y. Supp. 1026], the court says: "There can be no doubt that in an action for use and occupation, such as this was, the plaintiff is not entitled to recover unless he shows that the conventional relation of landlord and tenant exists"; in support of which the court cited several cases. The law seems to be well settled that in the absence of a contractual relation the action will not lie. (*Alt v. Gray*, 26 Misc. Rep. 843, [56 N. Y. Supp. 657]; *Stevens v. Hulin*, 53 Mich. 93, [18 N. W. 569].) Appellant concedes this to be the law, but insists that the notice given by plaintiff to defendant that the latter would be liable for rent if he continued to use and occupy the premises after May 1, 1911, should be construed as a finding that such relation did exist. Not only are all intendments in favor of the regularity of the action of the trial court, but "it is a well-settled rule that the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon." (*Paine v. San Bernardino etc. Co.*, 143 Cal. 656, [77 Pac. 659].) The complaint alleged that on May 1, 1911, "plaintiff leased to defendant and defendant hired of plaintiff" the premises described therein, which allegation was denied. Upon this issue the court found that no lease was made. This was in response to the allegation and the ultimate fact involved. The remainder of the finding purports to be and is a part only of the evidence adduced at the trial in support of the allegation that a lease was made. Conceding, but not deciding, that the relation of landlord and tenant might be implied from the giving of the notice and continued occupation of the premises by defendant, if standing alone and considered in the absence of other evidence, such fact cannot aid appellant. For aught disclosed by the record, since the finding is not as to the ultimate fact, other evidence may have been introduced as to many circumstances which might explain or destroy the implied effect of the finding. The evidence (not brought up in the record) might have disclosed that plaintiff had not, at the time of giving the notice, acquired title to the property, and

hence had no authority to act in the matter; or, if it had acquired title, that notice of such fact was not given defendant. Since it was the duty of the court to give judgment for plaintiff, if the relation of landlord and tenant existed, it must follow from the judgment rendered that the court construed its ambiguous findings contrary to appellant's contention.

The fact that plaintiff gave notice that defendant would be liable for rent, in the absence of any showing of assent on the part of defendant, is insufficient to show the existence of any contractual relations between the parties, without which plaintiff could not recover in an action of this character. In addition to the cases cited, see: *Jackson v. Phillips*, 13 John. (N. Y.) 106; *Preston v. Hawley*, 101 N. Y. 586, [5 N. E. 770]; *Hill v. Coal Valley M. Co.*, 103 Ill. App. 41; *Fender v. Rogers*, 97 Ill. App. 280; *Biglow v. Biglow*, 75 App. Div. 98, [77 N. Y. Supp. 716]; 18 Ency of Law, p. 169.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1432. Second Appellate District.—January 9, 1914.]

SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY (a Corporation), Appellant, v. **H. L. PILLSBURY**, as City Tax and License-Collector of the City of Long Beach, Respondent.

MUNICIPAL CORPORATION—ASSESSMENT FOR PUBLIC IMPROVEMENT—
LIABILITY OF RAILROAD RIGHT OF WAY.—A city, if not specially authorized by the legislature in clear and unambiguous language, is without power to levy an assessment on the right-of-way of a railroad company extending through the municipality for a portion of the cost of a combined bulkhead and sidewalk within the limits thereof, or to make any sale of such property to satisfy an assessment so attempted.

ID.—SALE OF RAILROAD RIGHT OF WAY—INJUNCTION.—If a sale of property being used for the purposes of which a railroad ordinarily uses its right-of-way is proposed in pursuance of such assessment, the railroad company is entitled to an injunction.

1D.—**STREET ACT OF 1903—APPLICATION TO RAILROAD PROPERTY.**—The Street Act of 1903 (Stats. 1903, p. 376) which provides for the "laying out, opening, extending, widening or straightening" of public streets and ways within municipalities, and which expressly provides that in making an assessment for the public work therein provided for, the same shall be levied upon the lands within the assessment district, "including the property of any railroad," does not make the right of way of a railroad corporation liable for assessment and sale on account of work having reference to the improvement of streets already laid out and established.

APPEAL from a judgment of the Superior Court of Los Angeles County. J. P. Wood, Judge.

The facts are stated in the opinion of the court.

A. S. Halsted, W. F. Palmer, F. A. Waters, and Wilfred M. Peck, for Appellant.

Stephen G. Long, City Attorney, and Percy Hight, for Respondent.

JAMES, J.—The stipulated and admitted facts in this case are: That plaintiff at all times material to the matters in controversy was a railroad corporation engaged as a common carrier of freight and passengers, and operating a line of railroad from the bay of San Pedro in Los Angeles County, through the city of Long Beach and other portions of the state of California, to the city of Salt Lake in the state of Utah; that said corporation was the owner of certain ground extending through the city of Long Beach which it actually used in the operation of its railroad; that in the year 1910 certain proceedings were had and taken by the common council of the city of Long Beach whereby it was proposed to construct a combined bulkhead and sidewalk within the limits of the municipality under authority given by an act of the legislature (Stats. 1901, p. 34); that by these proceedings an assessment district was established and an assessment attempted to be levied upon the land of plaintiff, and that the defendant, in default of the payment of such assessment, threatened to make sale of the property to satisfy the charge made against it. The proceedings were all completed during the year 1910, and the threatened sale was to have taken

place on the seventh day of October of that year. By the stipulation of the parties it was further agreed that all of the proceedings had by which authority was claimed to be given to make the proposed sale were in due form.

Plaintiff brought this action to have the assessment as to it declared null and void and to secure an injunction to prevent any sale being made of its property. A preliminary restraining order was issued, but upon trial being had, the case being submitted on a stipulation as to the facts, in substance as they are set out in the foregoing, judgment was entered in favor of defendant. This appeal, taken from that judgment, followed.

The contention of plaintiff is that as against the right-of-way and property incident to the actual maintenance and operation of the business of a common carrier, a municipality possesses no right to levy such an assessment as that proposed to be collected, or to make any sale of such property to satisfy that claim. The case of *Southern California Ry. Co. v. Workman*, 146 Cal. 80, [2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79], is relied upon as furnishing authority for appellant's position. In that decision it is declared that an attempt to enforce an assessment against the right-of-way of a railway corporation is without authority of law. It was there said: "To enforce an assessment against such right-of-way and track, extending about half a mile in distance, by a sale and conveyance, would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, and interfere with and impair the paramount interests which the public have in it for these purposes. The property of the corporation in its road and appurtenances essential to its operation and use, annexed to the franchise of the company to maintain and operate its road, is an entirety, and is thus charged, in the hands of the company, with an important trust in favor of the public, though the property in all other respects is essentially private, and operated for private gain. Public policy would seem to forbid a severance and segregation of its several special or particular parts, essential to the exercise of the franchises and the use and operation of the road, in forced sale upon legal process, or for an assessment." The supreme court in that decision cited other cases to the effect that the doctrine was a settled one that a lien would not

be enforced against a fractional part of a railroad's right-of-way, except when specially authorized by the legislature in clear and unambiguous language. Such, then, was the declared policy of the law as applicable to the conditions under which the assessment was attempted to be levied and collected, (assuming that a right-of-way easement was intended to be sold), unless the legislature by some express declaration had determined a contrary policy. General rules of public policy, of course, must be yielded in the face of legislation which pronounces in contradiction or modification thereof. In the opinion of the trial judge, which is printed in the clerk's transcript, it appears that it was considered that this rule of public policy had, subsequent to the making of the decision in *Southern California Ry. Co. v. Workman*, 146 Cal. 80, [2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79], been the subject of legislative change, and attention is called to the street acts of 1903 (Stats. 1903, p. 376), and 1911 (Stats. 1911, p. 730). The act of 1911 may be left out of consideration wholly, for it was enacted subsequent to the commencement and conclusion of all of the proceedings under which plaintiff's property was attempted to be sold. In the act of 1903, before cited, the legislature has expressly provided that in making an assessment for the public work therein provided for, the same shall be levied upon the lands within the assessment district, "including the property of any railroad." This act was an act which provided for the "laying out, opening, extending, widening, or straightening" of public streets and ways within municipalities, and not an act, as was the act of 1901 and the Vrooman Act (the last mentioned act being the one considered in *Southern California Ry. Co. v. Workman*, 146 Cal. 80, [2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79]), providing for the doing of work upon streets and ways already laid out and established. There might well have been a good reason why the legislature did not choose to change the policy of the law and make the right-of-way of a railroad corporation liable for assessment and sale on account of work having reference to the improvement of streets already laid out and established, and yet have considered it advisable to make such right-of-way assessable for the purpose of paying a portion of the expenses of laying out, or extending, or widening, or straightening of public streets. Because it was determined as

to one class of street work that such property should be so assessable, furnishes no logical or sufficient reason for the conclusion that the established policy of the law should be deemed to have been then changed as affecting all classes and kinds of street-improvement work which might be done under the different statutes. In the case of *Los Angeles Pacific Co. v. Hubbard*, 17 Cal. App. 646, [121 Pac. 306], decided by this court, there was considered the terms of the Street Act of 1903 which, as has been pointed out, contained an express provision making the property of a railroad company liable for the assessments therein provided to be made.

What is said in the foregoing presupposes a condition of the case where the intention of respondent was to sell every interest possessed by appellant in the land. The decision in the *Workman* case reserved from adjudication the question as to whether the fee or reversionary title of property to which an easement of a right-of-way is attached, might not be sold, leaving undisturbed the easement right. Later the case of *Fox v. Workman*, 155 Cal. 201, [100 Pac. 246], arose, that being a suit to recover damages against the municipal treasurer because of his refusal to make a sale on the same property and under the same assessment involved in *Southern California Ry. Co. v. Workman*, except that the bondholder therein insisted that he was asking only for a sale of the fee subject to the easement. In considering the latter appeal, the supreme court said: "The opinion of the court (referring to *Southern California Ry. Co. v. Workman*, 146 Cal. 80, [2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79]) states that it was evidently the intention to assess and sell the right-of-way as described in the assessment. If such easement had not been included in the proposed sale, there would, under the views expressed by the court regarding a sale of the fee, have been nothing to enjoin." The court determined that Fox, the plaintiff, had demanded a sale of both the fee and easement, and that he could not prevail.

In the case at bar it was stipulated, first, that the appellant was the owner in fee of the real property described in the assessment; that respondent proposed to sell the property. The following paragraph is then set out in the written stipulation of facts: "That there is now, and for more than two years last past has been, affixed to and located over, along and

upon the above described parcels of land, a portion of the main line of the railroad owned and operated by the plaintiff under its charter and franchise, consisting of standard gauge tracks, the center lines of which are shown in red upon the map hereto attached, . . . ; and said parcels of land above described are now, and have been during all the times herein referred to, used by the plaintiff for the sole and only purpose of operating its railroad thereon as a common carrier in accordance with the provisions of its charter."

The term "right-of-way" denotes the tenure by which land is held; it is descriptive of the easement right and not of the land to which it is affixed. (*Uhl v. Ohio River R. Co.*, 51 W. Va. 106, [41 S. E. 340]; *Atlantic & Pacific R. Co. v. Lesueur*, 2 Ariz. 428, [1 L. R. A. 244, 19 Pac 157].) The fact appears then that the property which was proposed to be sold was being used for the purposes for which a railroad ordinarily uses its right-of-way. It is not made to appear that there would be offered for sale the fee subject to the reserved easement in the railroad company to continue to use the ground for right-of-way purposes. If appellant owned the fee in the land, as is admitted, then every lesser interest was merged therein. No person can have an easement in land which he himself owns. (Jones on Easements, sec. 835.) And if, as is also admitted, the only uses to which the land was being put were those necessarily incidental to the operation of appellant's railroad and its business as a common carrier, then the sale proposed to be made would seem to contemplate that appellant's whole interest in the property should be taken away. Whether a sale would actually accomplish this result is not the question; if, under the conditions shown as to appellant's interest in the land, the apparent design of the proceedings was appropriate to accomplish that result, appellant is entitled to the remedy which is sought in this action.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 10, 1914.

Beatty, C. J., dissented from the order denying a rehearing by the supreme court, and filed the following opinion on March 10, 1914.

BEATTY, C. J.—I dissent from the order denying a rehearing.

The cause is decided on the authority of *Southern California Ry. Co. v. Workman*, 146 Cal. 80, [2 Ann. Cas. 583, 79 Pac. 586, 82 Pac. 79], and the grounds of my dissent from the present order are fully stated in my dissenting opinion in that case.

[Civ. No. 1431. Second Appellate District.—January 9, 1914.]

J. H. McINTYRE, Appellant, v. THE CITY OF LOS ANGELES et al., Respondents.

MUNICIPAL CORPORATION—CONTRACT FOR STREET IMPROVEMENT—RELEASE OF CONTRACTOR BY EXECUTION OF SECOND CONTRACT—REMEDY OF PROPERTY OWNER.—Where the board of public works, having entered into a valid contract for street improvement, makes another contract releasing the contractor from doing certain work required by the original contract, the remedy of a property owner is by appeal to the city council, which has power to set aside the assessment and order the work completed in accordance with the specifications; and if this remedy is not resorted to, an action to cancel the bond issued against his property for the improvement and to annul the lien thereof is not maintainable.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge.

The facts are stated in the opinion of the court.

Lucius M. Fall, for Appellant.

John W. Shenk, City Attorney, Leslie R. Hewitt, and Charles D. Houghton, for Respondents.

SHAW, J.—The purpose of this action was to obtain a decree declaring a street improvement bond, which had been

issued against plaintiff's property, canceled and the lien thereof annulled.

A general demurrer interposed to the complaint by the defendant was sustained. Plaintiff declined to amend, whereupon the court gave judgment for defendant, from which plaintiff appeals.

As appears from the complaint, the contract for doing the work was duly awarded to one T. E. Shaffer, with whom the board of public works, on August 17, 1910, duly entered into a valid contract for the performance thereof in accordance with the plans and specifications therefor. The specifications, among other things, provided for the construction of a stone wall as therein specified. Appellant concedes that all the proceedings required by law to be had and taken as a prerequisite for entering into the contract were duly had and taken, and the validity of the contract of August 17, 1910, is unquestioned. The cause of action is based upon the allegation of the complaint that on or about September 10, 1910, and after the board of public works had on August 17, 1910, entered into a valid contract for the doing of the work, it, without authority so to do, made another and different contract with Shaffer whereby he was released from and not required to construct the stone wall, as provided in the specifications for the improvement of the street, by reason of which Shaffer neglected and failed to construct the stone wall as required by the terms of the contract of date August seventeenth, but did perform the work in compliance with the contract dated September tenth, and that as performed under and pursuant to the terms of said last mentioned contract the work was accepted and the street improvement bond issued for the assessment made against plaintiff's lot.

We agree with appellant that the contract of date August seventeenth was a valid, binding contract under and pursuant to which the contractor obligated himself to perform the work in accordance with the specifications for the improvement of the street, which included the construction of the stone wall as specified. As shown by the allegations of the complaint, the board of public works had no authority to enter into the second contract, or in any manner release the contractor from doing any of the work as provided in the specifications in accordance with which the work was ordered

to be done. This being true, the second contract was null and void. As thus presented, it follows that the contractor neglected and failed to perform the work in accordance with his agreement, and failed to comply with the specifications in the performance of his contract. The case presented is one where the contractor has failed to perform the work in accordance with the specifications made a part of the contract, notwithstanding which failure the city by its proper officers has wrongfully accepted the work as done to its satisfaction in compliance with the terms of the contract. This was an error on the part of the official whose duty it was to see that the work was done in accordance with the terms of the only valid contract made, the remedy for which error and neglect of duty on his part, under the express provisions of section 11 of the Street Improvement Act, was an appeal to the city council, which had the power to set aside the assessment and order the work completed in accordance with the specifications. No appeal was taken. (*Ryan v. Altschul*, 103 Cal. 177, [37 Pac. 339]; *Diggins v. Hartshorne*, 108 Cal. 162, [41 Pac. 283]; *Fanning v. Leviston*, 93 Cal. 186, [28 Pac. 943]; *Himmelmänn v. Hoadley*, 44 Cal. 279.)

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 4, 1914.

[Civ. No. 1423. Second Appellate District.—January 9, 1914.]

JOHN LAPIQUE, Appellant, v. GEORGE J. DENIS et al.,
Respondents.

PLEADING—ASSIGNED CLAIM—ABSENCE OF ALLEGATION OF ASSIGNMENT.—A count in a complaint which does not allege any assignment or transfer to the plaintiff of the property or rights of action of the person whose claims to a right of action against the defendants are set forth in such count, is insufficient.

ID.—ACTION INVOLVING ESTATE OF DECEDENT—UNCERTAINTY OF COMPLAINT—SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND.—

Where, in an action against several defendants for an accounting for moneys received from an estate of a decedent and for a recovery of moneys alleged to have been received by them as rentals from property fraudulently included in the administration of the estate of the deceased, it cannot be determined from the allegations of the fourth amended complaint in what capacity either of the defendants is sought to be held liable, or what relation either of them bore to the plaintiff's assignor, or to the estate, or to its executor or special administrator; or when any of the sums of money for which they are to account were collected or received by them; or what facts existed either in the intentions or within the knowledge of the defendants which justify the plaintiff in alleging that the defendants acted corruptly or for the purpose of divesting the plaintiff's grantor of any right possessed by him, the court properly sustains a demurrer to the complaint without leave to amend.

APPEAL from judgments of dismissal of the Superior Court of Los Angeles County. J. P. Wood, Judge.

The facts are stated in the opinion of the court.

J. Lapique, *in pro. per.*, for Appellant.

Denis & Loewenthal, and Cole & Cole, for Respondents.

CONREY, P. J.—Separate demurrers to the fourth amended complaint were filed by the three respondents above named. The court having sustained said demurrers without leave to amend, judgments of dismissal were entered in favor of the said respondents, and the plaintiff appeals from said judgments.

The judgments recite the fact that similar demurrers to the preceding complaints in this action had been sustained by the court and that the plaintiff had failed to amend in the respects required as a result of the sustaining of said demurrers, and that therefore in sustaining these demurrers the orders were made without leave to amend.

As to the first count of the complaint it is sufficient to say that the plaintiff does not therein allege any assignment or transfer to the plaintiff of the property or rights of action of Antoine Begon, the person whose claims to a right of action against the defendants are set forth in said first count.

The second count of the complaint begins by adopting all of the paragraphs of the first count as parts of the second, and adds certain other paragraphs. In one of these it is alleged "that for value received, *before the filing of this fourth amended complaint*, said surviving husband of Maria Begon, deceased, Antoine Begon, duly assigned, conveyed, sold and transferred to John Lapique, this plaintiff, all his claims," etc. Demand is "for an accounting of all moneys collected and received from the estate of Maria Begon, deceased, by each and all of the defendants, from the 9th day of November, 1894, down to the date of judgment in this action," and for judgment against the defendants and each of them for a certain large sum of money, alleged to have been received by "the defendants" as rentals from property included in said administration, but which plaintiff says was community property of Antoine and Maria Begon.

Besides the respondents on this appeal, nine other defendants are named in the complaint. According to the allegations of the complaint, letters of special administration and letters testamentary were issued upon the estate of Maria Begon, deceased, at two certain dates in December, 1894. It is then alleged, "that ever since said last named date said defendant has been and now is the duly appointed, qualified and acting special administratrix and executrix of the estate of Maria Begon, deceased." The complaint does not state which defendant was so appointed. Inconsistently with this allegation, other allegations are made charging that the will which was admitted to probate was in fact not the last will and testament of said deceased, and that the defendants in procuring the admission to probate of the so-called will represented that they were acting at the request of Antoine Begon and that the property described in their petition was the separate property of his deceased wife, whereas the plaintiff says that in fact such representations were untrue. It is not alleged that the defendants knew that said representations were untrue, or did anything to prevent the matter from being determined on its merits, and it is not alleged that Antoine Begon was ignorant of the proceedings in probate. The only statement approaching such an allegation is that the petition for probate was heard by the court on a certain day "without notice in writing" to said surviving husband.

It is alleged that the acts of the defendants in said probate proceedings, and in collecting rents from the properties mentioned, were done "as agents, attorneys at law, legatees, devisees, so-called, and trustees of plaintiff's grantor, and were taken in said probate court by each and all of said defendants corruptly and for the purpose of divesting and cheating said grantor of his estate in said community property."

The demurrers are made upon the ground that the complaint does not state a cause of action, and also upon various grounds showing that the complaint is for various reasons uncertain, and for like reasons unintelligible and for like reasons ambiguous. Many of these points are well taken and it is unnecessary to review them at length. The complaint abounds in confused statements and in forms of statement such as those of paragraph 15, which set forth certain findings made in an action now pending on appeal in the supreme court, without alleging the facts stated in said findings as facts provable in this case. From the allegations in the complaint it cannot be determined in what capacity either of these three defendants is sought to be charged or held liable, or what relation either of them bore to Antoine Begon or to said estate or to its executor or special administrator; or when any of the sums of money for which they are to account were collected or received by them; or what facts existed either in the intentions or within the knowledge of the defendants which justify the plaintiff in alleging that the defendants acted corruptly or for the purpose of divesting plaintiff's grantor of any right possessed by him.

The judgments appealed from are affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1424. Second Appellate District.—January 9, 1914.]

W. H. ROBINSON et al., Respondents, v. JAMES B. BLEDSOE, Appellant.

TENANCY IN COMMON—ACQUISITION OF ADVERSE TITLE—TENANT AS TRUSTEE.—As a general rule a tenant in common, occupying, as he is presumed to, relations of trust and confidence toward his cotenants, may not acquire an adverse title to that under which possession of the property is held, without being charged as a trustee in the holding thereof for the joint benefit of the cotenancy; but the relation of cotenants is not necessarily so intimate as to preclude one of them from acquiring and asserting an adverse claim against the others.

ID.—EXISTENCE OF TENANCY IN COMMON—COLOR OF TITLE AND ASSERTION OF CLAIM.—In order that a tenancy in common may exist between parties in the holding of land, it is necessary that they possess some color of title and assert their claim in some tangible way.

ID.—STATE LAND—POSSESSORY RIGHT—CHARACTER OF POSSESSION.—Under section 1006 of the Civil Code, a possessory right to state lands may be acquired which will be sufficient against all except the sovereignty. But this right must be evidenced by actual possession, for there can be no constructive possession in such a case.

ID.—ACTUAL POSSESSION—WHAT CONSTITUTES—NOTICE OF CLAIM.—By actual possession is meant a subjection to the will and dominion of the claimant. It is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. The acts and things done must be of such a nature as to give notice to the public of the claim.

ID.—DESERT LAND USED BY CATTLEMEN—TITLE ACQUIRED BY ONE NOT HELD IN TRUST FOR OTHERS.—Where, after a number of cattlemen have for years used a large tract of desert land for grazing, one of their number purchases a part of the land from the state, the others who have never asserted, or attempted in any way to give notice, that they claimed the right to the possession of any particular lands, except thirty acres thereof, cannot maintain an action to have it declared that the purchaser holds the land in trust for them as tenants in common.

ID.—EXCLUSION OF COTENANT—RIGHT TO CONSIDER TENANCY AT END.—If the plaintiffs in such action fenced thirty acres of the tract, and excluded the defendant therefrom because of his refusal to pay his

proportion of the cost of the fence, this entitled him to treat the assumed cotenancy, if any existed as to that ground, as at an end.

ID.—IMPROVEMENTS—FAILURE OF COTENANT TO MAKE CONTRIBUTION—SUMMARY REMEDY AGAINST HIM.—There is no right in cotenants, who make improvements on the common property, to seize the property of a noncontributing member and so summarily work out their remedy for his failure to contribute to the cost of improvements made with his consent.

ID.—POSSESSION OF COMMON PROPERTY—EQUAL RIGHTS OF COTENANTS.—To constitute a tenancy in common there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy.

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order refusing a new trial. Frank F. Oster, Judge.

The facts are stated in the opinion of the court.

R. E. Bledsoe, Leonard & Surr, and George W. Hellyer, for Appellant.

Byron Waters, for Respondents.

JAMES, J.—Action to have title to certain land, which was secured by purchase from the state, declared to be held in trust for the benefit of plaintiffs as tenants in common with defendant. Plaintiffs had judgment. Defendant's motion for a new trial was denied, and he appealed from that order and from the judgment.

By the testimony shown in the bill of exceptions it appears that in the county of Kern, near the border line of San Bernardino County, there is an extensive stretch of arid land which is commonly called the "Mojave River country." This land has been used by various cattle owners for from twenty to forty years, and perhaps longer, as a grazing ground. It has been so used generally with no permission from the owner, except that which is inferable from the fact that no objection has been raised against such use. This ground has no water except by the rain that falls during the winter months. At places, however, which are usually situated many miles apart, water in small quantities comes to the surface of the ground in the form of springs, and at these places the cattle which graze

over the common range drink. About the watering places once or twice each year rodeos have been held. At these times the different cattle owners were given notice of the holding of the rodeo and they attended for the purpose of separating their cattle from the common herd. The calves were then branded and any unidentified or unclaimed animals, called "mavericks," were turned over to the cattle man who had the rodeo in charge, as his perquisites. Customarily some of the cattle raisers would erect inclosures and frame structures at these watering places and in that case they, by consent of their fellows, were deemed to be in authority at the round-ups. In general, between the times when the round-ups were held, none of the cattle men resided at the watering places, but lived elsewhere, and no ownership in the land over which the cattle grazed appears to have been asserted by the owners of the herds.

For many years prior to 1893 one Durnal had grazed his cattle over that desert range. He made his headquarters at Flowing Wells, which was the name of a watering place and not a town. At this place, scattered over about two acres of ground, were eight or nine springs of water. In order to make the water better available for supplying the cattle, a square wooden pipe of about four by four inches in dimensions was made by nailing four boards together. One length of this pipe was thrust down into the spring and by that means the water was raised above the surface of the ground and conducted into a trough. Durnal built a rough lumber barn with a shake roof, also a small cabin, about a mile from the wells, and at another point several miles distant he had a stock corral, a second cabin, and a pump. His place of residence was at Tehachapi. In the year mentioned, one Downey, on behalf of himself, W. E. Boren, plaintiff W. H. Robinson, and the defendant Bledsoe, purchased from Durnal for the sum of one hundred and fifty dollars all of the improvements which he had placed at Flowing Wells, and also similar property at other points. Each of the persons mentioned were cattle raisers who resided along the Mojave River many miles away. From thence on the four men used Flowing Wells for rodeo purposes. They shared together the use of the improvements, but they had no joint interest in cattle, as each man severally owned and managed his herd. They

moved the barn and cabin just mentioned to a point close to the springs. In 1905, Boren and Downey sold their cattle to plaintiff Bennette, and at the same time sold their interest in the various improvements used by them on the desert, including the Flowing Wells property. Plaintiff Bennette and defendant Bledsoe were not on friendly terms because of some ancient grudge existing between them, and from the time that the former bought the cattle and interests of Boren and Downey, when the two men met at the rodeos there was no interchange of friendly converse. Each ignored the presence of the other. In 1906 Robinson proposed to the defendant that a fence be built at Flowing Wells for the purpose of forming an inclosure within which cattle might be kept when desired. Defendant stated that he would be unable to assist in the building of the fence, but would pay his proportion of the cost, if one was built by the other two men. Robinson hired some men, and they, with Bennette and a son of Robinson, put up a pasture fence inclosing about thirty acres. Robinson presented a bill to defendant for the amount which he claimed to be the proportion of the cost of building the fence chargeable to defendant. Bledsoe refused to pay this bill on the ground that the amount charged for labor was excessive, and the account remained unsettled. Because of Bledsoe's refusal to discharge this alleged indebtedness plaintiffs refused to allow him to use the pasture, making their permission for such use conditional upon the payment of the account. The trial court found these facts as to the building of the corral and the exclusion of defendant from the use of it. It appears that none of the defendants knew to whom the land belonged which they were grazing their cattle over and upon which the Flowing Wells springs were located; they made no claim to the ownership of it. The witness Downey, the predecessor in interest of Bennette, testifying for the plaintiffs said: "I never claimed any title to that land. I rather thought that I had a right to water my cattle there. Everybody else had the same right; they enjoyed the same right. I did not claim the right to enjoy the exclusive use of that water. . . . I have seen as many as twenty men on the ground there, different owners and their helpers; they would all in common, and in connection with myself, Bledsoe, Robinson, and Boren, use the place as a round-up place, and for cattle purposes—

drinking. . . . When I stated a moment ago that we all used them in common, I referred to the water and corral." These statements of the witness describe correctly the general condition as to the rights assumed by the cattle owners on that range. In 1908, defendant caused surveys to be run about some two hundred and eighty acres of land, including that upon which Flowing Wells springs were located. He learned that the land was a part of the school lands of the state of California, and thereupon he made application to purchase the two hundred and eighty acres. His application was approved and in November, 1908, he received his certificate of purchase. He next gave notice of his ownership to the plaintiffs, and this notice required that if they (the plaintiffs) desired to continue the use of the wells, they must arrange for such use by lease. In this notice he offered to pay any sums that might be reasonable for plaintiffs' share in the improvements. Plaintiffs refused to lease from defendant, and shortly thereafter brought this suit.

The correctness of the proposition, as a general rule, that a tenant in common, occupying as he is presumed to, relations of trust and confidence toward his cotenants, may not acquire an adverse title to that under which possession of the property is held, without being charged as a trustee in the holding thereof for the joint benefit of the cotenancy, is not disputed. There are two principal questions presented by this appeal, to wit: 1. Whether the relation of cotenants existed between plaintiffs and defendant in their possession of the land which defendant purchased. 2. Assuming that such relation did exist, whether under the circumstances shown in evidence defendant was relieved from his trust obligations so as to permit him to make purchase of title and enforce it to the exclusion of the plaintiffs. In order that a tenancy in common should have existed between plaintiffs and defendant in the holding of the lands, it was necessary that the parties should have possessed some color of title and asserted their claim in some tangible way. Under the Civil Code, section 1006, a possessory right to state lands may be acquired which will be sufficient against all except the sovereignty. This possessory right must be evidenced by actual possession, for there could be no constructive possession in such a case. "By actual possession is meant a subjection to the will and dominion of the claimant,

and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property." (*Coryell v. Cain*, 16 Cal. 567.) The acts and things done must be of such a nature as to give notice to the public of the claim. (*Brumagim v. Bradshaw*, 39 Cal. 24.) Applying the requirements of these rules to the evidence here shown, it will be seen, first, that the alleged cotenants never asserted, or attempted in any way to give notice, that they claimed the right to the possession of any particular lands, except as to the thirty-acre pasture, which two of them fenced and which will be referred to in a later portion of this opinion. It is well to point out here that the question as to whether any of the cattle owners, by continued use of the water which came to the surface of the ground at the different oases, acquired easement rights therein which could not be destroyed upon transfer of the fee in the land, is not involved. This action concerns the land alone. As has been noted, there had been no claim made by the alleged cotenants that they were entitled to the possession of any certain land. The range extended for many miles and nothing short of the line of the horizon seems to have marked a limit to the wandering of the herds. If defendant had been permitted, for instance, to purchase a complete section of land, would his cotenants have claimed the right to share in that purchase? They might as reasonably have done so, for they declare in their complaint that the two hundred and eighty acres purchased included the lands upon which the springs were located, *and other lands as well*. They marked out no boundary to lands necessary to the convenient use of the water, which was the one inducement, as all agree, that brought them and their cattle there. There was some testimony that cattle men respected range limits as between each other, but that appears to have been a mere matter of private understanding and of which no sort of notice was given. There was no tenancy in common of specific land either described in the complaint or illustrated by the evidence.

Coming now to the thirty-acre plat which was fenced by plaintiffs: This pasture was used by plaintiffs, and the court found that they had excluded defendant from its use, making such refusal conditional upon defendant paying a proportion of the cost of the construction of the fence. Plaintiffs cannot

maintain that as to the pasture a cotenancy existed, while admitting, as the court found, that they denied the defendant, one of the alleged cotenants, the use of it. "Neither cotenant has any power to compel the others to unite with him in erecting buildings or in making any other improvements upon the common property. . . . If a cotenant has assented to or authorized improvements to be made, he is answerable therefor, and a lien exists against his property for the amount thereof against him and his grantees with notice." (Freeman on Cotenancy, 2d ed., par. 262.) There is no right in cotenants to seize the property of the noncontributing member and so summarily work out their remedy for his failure to contribute to the cost of improvements made with the latter's consent. "To constitute a tenancy in common there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy," observes Mr. Freeman in the work to which citation has been made; and at paragraph 155 he states: "As the rule forbidding the acquisition of adverse titles by a cotenant, from being asserted against his companions, is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint-tenants, tenants by entirety, and coparceners, always hold by and under the same title. Their union of interest and of title is so complete, that, beyond all doubt, such a relation of trust and confidence unavoidably results therefrom that neither will be permitted to act in hostility to the interests of the other in reference to the joint estate. Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. . . . As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in common are not necessarily prohibited from asserting an adverse title." The refusal to allow defendant to share in the use of the pasture

entitled him to treat the assumed cotenancy, if any existed as to that ground, as at an end. If this result did not follow, certainly the relations shown to have existed between the parties were such as to negative the presumption of mutual trust and confidence.

These conclusions, which affect the main propositions involved in this appeal, require that the judgment and order should be reversed as not being sustained by the evidence.

The judgment and order are reversed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1425. Second Appellate District.—January 9, 1914.]

RACHEL A. McEWEN, Respondent, v. NEW YORK LIFE INSURANCE COMPANY (a Corporation), Appellant.

LIFE INSURANCE—REPRESENTATIONS IN APPLICATION—STATEMENTS AS TO PRIOR AILMENTS AND ACCIDENTS—WHETHER SUBSTANTIALLY TRUE.—Where an applicant for life insurance, in reply to the question, "What illnesses, diseases, or accidents have you had since childhood?" answers "typhoid pneumonia," whereas he was once struck by a mule as a result of which one rib was fractured, causing the spitting of purulent matter and totally disabling him for a period of nearly four months, followed by partial disability for a longer period, such answer is not "substantially true," and it was error for the court in instructing the jury on this point to use the expression "substantially true," without defining it, where it appears that the jury misunderstood the term in that they found the applicant's representation substantially true.

ID.—REPRESENTATIONS BY INSURED—"SUBSTANTIALLY TRUE"—MEANING OF WORDS.—"Substantially true" does not mean somewhat true, partially true, on the one hand; nor does it mean true in every possible and immaterial respect, on the other. It means true, without qualification, in all respects material to the risk.

ID.—SUBMITTING SPECIAL INTERROGATORIES TO JURY—FORM OF QUESTIONS.—Questions propounded to the jury as to such representations, upon which they were requested to render special verdicts, in an action on the policy, should have been whether or not the answers so given were true; or, if the term "substantially true" were

employed, the court should have instructed the jury as to the meaning of those words.

ID.—MATERIALITY OF REPRESENTATIONS—WHETHER QUESTION FOR JURY OR FOR COURT.—In such action it was error for the court to submit to the jury the question whether the representations so made were material, and in effect that, notwithstanding the fact that they might find the answers and representations to be untrue, they should, nevertheless, render a verdict in favor of the plaintiff, unless they found that such representations were material. Where the materiality of the representations depends upon inferences drawn from facts and circumstances proved, the question is one for a jury. A different rule, however, applies where the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the questions, have indicated that they deemed the matter to be material.

ID.—MISREPRESENTATIONS BY INSURED—ADMISSIBILITY OF EVIDENCE TO SHOW.—Declarations made by an insured person, inconsistent with statements which he made in his application as to prior ailments and accidents, are admissible against his beneficiary in an action by the latter on the policy, where the policy expressly reserved the right in the insured to change his beneficiary.

ID.—VESTED INTEREST OF BENEFICIARY—WHEN DOES NOT EXIST.—Where a policy of life insurance reserves to the insured the right to change his beneficiary, the beneficiary has no vested interest during the lifetime of the insured.

ID.—SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.—Where special findings are not only inconsistent with themselves, but irreconcilable with the general verdict, this is ground for reversal.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Wm. M. Finch, Judge presiding.

The facts are stated in the opinion of the court.

Edwin A. Meserve, and Paul H. McPherrin, for Appellant.

Murphey & Poplin, for Respondent.

SHAW, J.—This action was instituted by the mother of Charles B. McEwen, deceased, to recover the amount of a policy on his life issued by defendant on July 7, 1910, upon a written application made therefor by deceased on June 29,

1910. Judgment went for plaintiff, from which, and an order denying its motion for a new trial, defendant appeals.

The insured, who was twenty-eight years of age, died on November 20, 1910. Defendant resisted payment of the policy, alleging as a ground therefor that the insured had procured the issuance of the same by means of fraud, concealment, and misrepresentations made by him in answering written questions propounded to him by defendant, and upon the faith of which the policy was issued. Some of the questions and answers were as follows:

(1) "What is your occupation? (Full details.) A. Proprietor of collecting agency.

(2) "How long have you been engaged in your present occupation? A. Ten years.

(3) "What was your previous occupation? A. Cattle business.

(4) "What is your daily consumption of wine, spirits or malt liquors? A. No daily habit—occasional beer.

(5) "Have you at any time used any of them to excess? A. No.

(6) "Have you ever raised or spat blood? A. No.

(7) "What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) A. Typhoid pneumonia. One attack in 1891; duration two months; severe; complete recovery.

(8) "How long since you consulted or have had the care of a physician? A. 1891; Dr. Thomas, Bucyrus, Ohio.

(9) "If so, for what ailment; name and address of physician? A. Typhoid pneumonia."

At the close of the questions, McEwen stated in writing that "I declare, on behalf of myself and of any person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true."

In addition to a general verdict, the jury were instructed to render special verdicts upon the answers given to the foregoing questions, and in submitting the same to the jury in each case was called upon to state whether or not the answers so given by McEwen in response to the questions were "sub-

stantially true." The use of the term, "substantially true," without instructions restricting or explaining the same, gave to the jury in their consideration of the answers a wide latitude, and it is apparent from some of the answers given that they did not understand the meaning of the term. As illustrating such fact, the jury found that, in response to the question, "What illnesses, diseases, or accidents have you had since childhood; name of disease, number of attacks, date, duration, severity, results?" McEwen's answer thereto, "Typhoid pneumonia, one, 1891, 2 months, severe, complete recovery," was substantially true, and at the same time, by its special verdict, found that in the month of July, 1909, he was struck by a mule, as a result of which one rib was fractured, causing the spitting of purulent matter and totally disabling him for a period of nearly four months, followed by partial disability for a longer period. "'Substantially true' does not mean somewhat true, partially true, on the one hand; nor does it mean true in every possible and immaterial respect, on the other. It means true, without qualification, in all respects material to the risk." (*France v. Aetna Life Ins. Co.*, 9 Fed. Cas. 657 (No. 5027); *Campbell v. New England Mutual Life Ins. Co.*, 98 Mass. 381; *Jeffrey v. United Order of Golden Cross*, 97 Me. 176, [53 Atl. 1102].) The questions propounded to the jury and upon which they were requested to render special verdicts, should have been whether or not the answers so given were true; or, in using the term "substantially true," the court should have instructed it as to the meaning of the term.

Not only did the court err as above stated, but likewise erred in submitting to the jury throughout its instructions the question as to whether or not the representations so made were material, and it was in effect told that, notwithstanding the fact that it might find the answers and representations so made by McEwen to be untrue, it should, nevertheless, render a verdict in favor of plaintiff, unless it found that such representations *were material*. Where the materiality of the representations depends upon inferences drawn from facts and circumstances proved, the question is one for a jury. A different rule, however, applies where the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the ques-

tions, have indicated that they deemed the matter to be material. Says May on Insurance, section 185: "The inquiry shows that the insurer considers the fact material, and an answer by the insured affords a just inference that he assents to the insurer's view. The inquiry and answer are tantamount to an agreement that the matter inquired about is material, and its materiality is not therefore open to be tried by the jury," in support of which text the author cites a number of cases. This rule has been modified by our statute, which provides that "the materiality of a representation" (Civ. Code, sec. 2581) "is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of proposed contract, or in making his inquiries." (Civ. Code, sec. 2565.) "The language of a representation is to be interpreted by the same rules as the language of contracts in general." (Civ. Code, sec. 2573.) The representations were in writing, and where a contract is in writing its meaning is not for the jury to determine, but its interpretation is a question of law for the determination of the court; hence, since the court must interpret the language in which the representation is made, the court must likewise determine whether, so interpreted, it is material in that the insurance company was by reason thereof influenced in "forming its estimate of the disadvantages of the proposed contract, or in making its inquiries." Conceding that by reason of this statute the rule laid down in May on Insurance, section 185, and followed by the courts of many states, is inapplicable, we are, nevertheless, of the opinion that under the statute the materiality of the representations was a question of law for determination of the court and not the jury.

For the purpose of showing that the representations so made by McEwen were false, defendant offered evidence which tended to prove that on September 27, 1909, he had stated to a physician that he spat blood and had hemorrhages in the night and morning after coughing; and also that on October 22, 1910, in the trial of a case where he was charged with the commission of a public offense on July 26, 1910, he testified in extenuation of the alleged offense that he was intoxicated; that up to about ten days before October 22, 1910,

he was a heavy drinker and drank liquor to excess, resulting at times in a condition of prolonged intoxication. The court sustained plaintiff's objection to this evidence, holding that such declarations, though inconsistent with McEwen's representations made to defendant when applying for the policy, were, nevertheless, inadmissible against the beneficiary therein. This ruling is assigned as error. As we understand from the presentation of the case by counsel for both parties, this ruling was based solely upon the theory that plaintiff, named as beneficiary in the policy, had a vested interest therein, and hence her rights could not be affected by declarations made by the insured, unless they were part of the *res gestae*. This principle is fully supported by the case of *Yore v. Booth*, 110 Cal. 238, [52 Am. St. Rep. 81, 42 Pac. 808], as well as numerous cases in other jurisdictions. This case, however, cannot be deemed authority in support of respondent's contention, for the reason that by the express terms of the contract the insured reserved to himself the right of revocation as to the beneficiary. By the terms of the policy the company agreed to pay, upon proof of the death of Charles B. McEwen, the sum of fifteen thousand dollars "to Rachel A. McEwen, mother of the insured, beneficiary, with right of revocation"; and immediately following, under the head of "Change of Beneficiary," the policy provides that "when the right of revocation has been reserved . . . the insured . . . may . . . designate a new beneficiary." In the case of *Waring v. Wilcox*, 8 Cal. App. 317, [96 Pac 910], this court held, reading from the syllabus: "Where a policy of life insurance reserves to the insured the right to change the beneficiary, upon written request therefor, the interest of a designated beneficiary prior to the death of the insured is that of a mere expectancy of an incompleting gift, subject to revocation at the will of the insured." To the same effect are the cases of *Hopkins v. Northwestern Life Assur. Co.*, 99 Fed. 199, [40 C. C. A. 1]; *Thomas v. Grand Lodge*, 12 Wash. 500, [41 Pac. 882]; and *Union Mutual Assoc. v. Montgomery*, 70 Mich. 587, [14 Am. St. Rep. 519, 38 N. W. 588]. Since the insured had the right to change the beneficiary named in the policy, it must follow that plaintiff had no vested interest therein. Until McEwen's death, he might have named any one, including his estate, as beneficiary in the policy, and this

being true, the ownership of the policy must be deemed to have been vested in him. (*Smith v. National Benefit Soc.*, 51 Hun, 575, [4 N. Y. Supp. 521].) The right of plaintiff was that of a successor in interest to deceased, and hence, under the provisions of section 1853 of the Code of Civil Procedure, proof of the declaration, if it tended to prove the falsity of the representations made by McEwen, should have been admitted. (*Steinhausen v. Preferred Mut. etc. Assoc.*, 59 Hun, 336, [13 N. Y. Supp. 36]; *Thomas v. Grand Lodge*, 12 Wash. 500, [41 Pac. 882].)

Having reached the conclusion that the case was, for the reasons given, tried upon an erroneous theory, as to which, however, we must concede the authorities are by no means harmonious, we deem it unnecessary to discuss numerous other errors assigned by appellant. Suffice it to say, the special findings of the jury, some of which are not justified by the evidence, are not only inconsistent with themselves, but irreconcilable with the general verdict, which fact alone would warrant a reversal. (*Di Vecchio v. Luchsinger*, 12 Cal. App. 222, [107 Pac. 315]; *Cox v. Delmas*, 99 Cal. 124, [33 Pac. 836]; *McAulay v. Moody*, 128 Cal. 208, [60 Pac. 778].) The trial court should have granted defendant's motion for a new trial.

The judgment and order are, therefore, reversed.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 6, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 10, 1914.

[Civ. No. 1420. Second Appellate District.—January 15, 1914.]

LAWRENCE JENSEN, Respondent, v. FRED DORR, Appellant.

VESSELS—LIEN AGAINST YACHT FOR CONSTRUCTION WORK—EXISTENCE INDEPENDENTLY OF ATTACHMENT.—A lien upon a yacht for services and materials furnished in its construction, by virtue of the chapter of the Code of Civil Procedure beginning with section 813, is complete and sufficient without the attachment therein provided for. The lien is prior to and exists independently of any attachment.

ID.—CODE PROVISION FOR LIEN—LIBERAL CONSTRUCTION.—The code provision for such lien is not to be strictly but liberally construed, in view of the requirement of section 4 of the Code of Civil Procedure, that "its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

ID.—TIME LIMIT OF LIEN—COMMENCEMENT OF ACTION WITHIN YEAR.—The commencement of an action to enforce such lien, in the form provided by sections 814 to 817 of the Code of Civil Procedure, within a year from the time the cause of action accrued, gives the court jurisdiction which cannot be lost merely because the necessary or unnecessary delays of litigation may postpone the entry of judgment until after the expiration of the year; section 813 of the Code of Civil Procedure providing that "such liens only continue in force for the period of one year from the time the cause of action accrued."

ID.—FORM OF ACTION—PROCEEDINGS QUASI IN REM.—When such action is commenced in the form of a personal action against the owner, as well as for the enforcement of the lien, the proceeding is not *in rem*, but *quasi in rem*.

ID.—DISCHARGE OF DEFENDANT IN BANKRUPTCY—EFFECT ON LIEN.—The fact that prior to the trial of the action the defendant is discharged in bankruptcy, so that it becomes impossible to obtain a personal judgment against him, does not prevent the enforcement of the existing lien against the yacht.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

Wilbur Bassett, for Appellant.

Patterson Sprigg, for Respondent.

CONREY, P. J.—In this action the plaintiff seeks to recover upon original and assigned claims for services and material furnished in this state, at the special instance and request of the defendant, for the yacht "Yankee Girl" in the construction of said yacht owned by the defendant. As security for said demands, the plaintiff claims the right to enforce a lien in and upon said yacht under and by virtue of section 813 et seq., of the Code of Civil Procedure. The action was commenced in the year 1907, which was within one year from the time each cause of action accrued. The superior court entered judgment in favor of the plaintiff (but not personally against the defendant) for a specified sum; determined that said yacht, her engines, etc., are liable for the payment of said sum, and ordered that said described property be sold by the sheriff in the manner provided by law in satisfaction of such judgment. The defendant appeals from the judgment.

On behalf of appellant it is claimed that the judgment is against law because the liens so asserted expired before the judgment was rendered. This requires a consideration of that chapter of the Code of Civil Procedure, beginning with section 813, declaring the liability of steamers, vessels, and boats for various kinds of services rendered and supplies furnished for their benefit, including work done and materials furnished in this state for their construction, repair or equipment. After declaring that demands for these several causes constitute liens upon such vessels, it is said that "such liens only continue in force for the period of one year from the time the cause of action accrued."

First, it should be noted that these claims arise in connection with the construction of a boat, and not for work done after its active use in navigation, and therefore none of the claims involved is of the class arising from maritime contracts. The action was commenced in the form of a personal action against the owner, as well as for the enforcement of these liens. He was personally served with summons and appeared in the action. The suit is not a proceeding *in rem*. It is not against the thing as defendant and the judgment is not that the thing is indebted. Under section 817 et seq., the plaintiff is entitled to certain attachment proceedings ancillary to the enforcement of his lien, but such attachment

proceedings are not essential to the prosecution of the action. It is conceded by counsel for both parties that the lien is prior to and exists independently of any attachment. "The attachment under section 817 presupposes the existence of a lien." (*Jensen v. Dorr*, 157 Cal. 437, [108 Pac. 320].) In the case at bar it will be assumed that there has been no attachment, inasmuch as the only attempt in that direction was so made that it was held to be void and was dismissed.

In the ordinary course of proceeding judgment would have been rendered herein against defendant Dorr personally, and in other respects the judgment would have been as now rendered. During the pendency of this action, however, the defendant was adjudged a bankrupt and prior to the trial herein duly received his discharge in bankruptcy. Such discharge having been pleaded and proved, the court was unable to render a personal judgment. Appellant's contention seems to be that, since the action is not a proceeding *in rem*, and since under the circumstances last above noted there could be no personal judgment, therefore, the entire action fails; and especially he insists that this must be so in view of the fact that no attachment levy was made prior to the expiration of the year of the lien as prescribed by section 813.

Since the attachment in this particular kind of case does not create or extend the lien, but the lien is complete and sufficient prior to the attachment, we think that the argument based upon the absence of an attachment must fail. Neither do we agree that the code provision concerning this lien must be strictly construed. It is a part of the Code of Civil Procedure and is to be construed in view of the requirement stated in section 4 thereof, that "its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." So construed, it is reasonable to say that the commencement of an action in the form provided by section 813 et seq., during said period of one year for the purpose of enforcing such lien, gives the court a jurisdiction which cannot be lost merely because the necessary or unnecessary delays of litigation may postpone the entry of judgment until after the expiration of said period.

The fact that by reason of defendant's discharge in bankruptcy it became impossible to obtain a personal judgment

against him, furnishes no valid reason for claiming that an existing lien of this character cannot be enforced against the specific property covered thereby. The condition is analogous to that which exists where a lien has been placed by attachment against property of a nonresident debtor, against whom personal service cannot be had, and where the jurisdictional steps are confined to the publication of summons. In such case, although the judgment rendered has no force as a personal judgment, it furnishes a legal basis for satisfaction of the demand out of the attached property. In that class of cases, as well as in actions like the present, the proceedings are said to be *quasi in rem*. (*Olsen v. Birch & Co.*, 133 Cal. 479, 483, [85 Am. St. Rep. 215, 65 Pac. 1032].)

Appellant's counsel points out that the lien claimed here is a secret lien and insists that we are here concerned, not only with the rights of plaintiff and defendant, but with the rights of third parties, such as purchasers, encumbrancers, or other lien claimants, who may be precluded by some admission, estoppel, or fiction of consent running against this defendant. There is nothing in the record here to show that anybody is concerned as to the validity of this judgment other than the plaintiff and defendant. The defendant has had his day in court and has been protected against any personal judgment. If the proceedings herein are not sufficient to give title against all the world in favor of a purchaser at the execution sale, and if perchance the effect of such sale would be to pass nothing more than the title of the defendant, with or without being subject to other liens, that is a matter which need not concern the defendant, since at least the lien is good against him.

It is also claimed that the findings are not supported by the evidence, and especially that some of the allegations of assignment of claims to the plaintiff were not proved. We have examined the record and are satisfied that there is sufficient evidence of the assignments and of the authority to make those assignments as to all of the claims included in the judgment. The claims set forth in the fourth, twelfth, fifteenth, sixteenth, seventeenth, and nineteenth counts of the complaint are not included in the judgment. The amount of the judgment shows that it is the sum of the other claims, with

legal interest thereon from the time of completion of the yacht to the date of entry of the judgment.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 11, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 16, 1914.

[Civ. No. 1287. First Appellate District.—January 20, 1914.]

BETTS SPRING CO. (a Corporation), Respondent, v. JARDINE MACHINERY CO. (a Corporation), Defendant; and JOSEPH B. JARDINE, Defendant and Appellant.

TRIAL—CONTINUANCE ON GROUND OF ABSENCE OF DEFENDANT—ABUSE OF DISCRETION IN REFUSING.—It is an abuse of discretion to refuse a continuance on the ground of the absence of the defendant, where it is shown by the statement of the plaintiff's counsel that no previous continuance has been requested and that the cause has been on the calendar for two years, and by the uncontradicted affidavit of counsel for the defendant that the defendant, who is the only witness to prove his defense, is ill, and, in search of health, has journeyed to Europe, from where he will return in two months; there being no intimation that the motion is not made in good faith, nor any showing that the plaintiff will be injured or prejudiced by the delay.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Clarence A. Raker, Judge presiding.

The facts are stated in the opinion of the court.

Louis H. Brownstone, for Appellant.

S. J. Hankins, and Rufus H. Kimball, for Respondent.

KERRIGAN, J.—This is an appeal by defendant Joseph B. Jardine from the judgment and from an order denying his motion for a new trial.

In support of the appeal it is first claimed that the court erred in denying appellant's motion for a continuance, and that for this error the judgment should be reversed.

We agree with this contention, and will therefore confine the discussion to this point.

When the case was called for trial counsel for appellant moved for a continuance of the trial, and filed on behalf of his client an affidavit, averring that three months prior thereto the appellant had suffered a stroke of apoplexy, and shortly thereafter visited Europe, where he went on the advice of his physician in an endeavor to regain his health; that he was in Scotland at the present time, and it would be two months before he returned to San Francisco. The affidavit also averred that the appellant was the only witness to prove the matters and things set forth in his defense. There was no counter affidavit; but Mr. J. S. Reid (who, it appears, represented the plaintiff at that time) made a statement in open court to the effect that the case had been on the calendar of one of the departments of the court for two years; that it had been on the present extra session court calendar for three weeks. Viewing this statement, for argument's sake, as a proper matter for the consideration of the court; and remembering, too, as stated by Mr. Reid, that no motion for a continuance had theretofore been made by the appellant, nevertheless we are of the opinion, the averments in the affidavit of appellant's counsel being undisputed, that the continuance should have been granted.

The motion for continuance was made under section 594 of the Code of Civil Procedure, which provides that a court may for good cause postpone the trial of a case in the absence of a party. It is a well-settled rule of law that an application for a continuance is addressed to the sound discretion of the trial court, and that its action thereon will not be disturbed on appeal unless it clearly appears that there has been an abuse of discretion. In this case the defendant was ill, and in search of health had journeyed to Europe, from whence he would return in two months; he was the only witness to prove his defense; there was no intimation

that the motion was not made in good faith, nor was there any showing that the plaintiff would be injured or prejudiced by the delay. The plaintiff himself (on whom rests the duty of taking the initiative in bringing an action on for trial) showed that this cause had been on the court's calendar for two years; and while it may be a matter of notoriety that in the past the crowded condition of the calendar of the superior court of San Francisco caused much delay in bringing matters to a hearing, yet that condition would not account for two years' inaction if any reasonable effort of plaintiff had been made to force progress. These being the undisputed circumstances of the case, it must be held that the court abused its discretion in denying the appellant's motion for a continuance. This view finds ample support in the following cases: *Jaffe v. Lilienthal*, 101 Cal. 175, [35 Pac. 636]; *McMahan v. Norick*, 12 Okl. 125, [69 Pac. 1047]; *Storer v. Heitfeld et al.*, 17 Idaho 113, 125, [105 Pac. 55].) There is nothing hostile to the views here expressed in the cases relied upon by the plaintiff. In each of those cases there was a conflict in the showing made for the continuance; and that reason alone would have justified the appellate court in refusing to interfere with the trial court's action.

The judgment and order are reversed.

Lennon, P. J., and Richards, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 18, 1914.

[Crim. No. 490. First Appellate District.—January 20, 1914.]

**THE PEOPLE, Respondent, v. CALOGERO BALESTIERI,
Appellant.**

CRIMINAL LAW—HOMICIDE—PHOTOGRAPHS OF DECEASED—ADMISSIBILITY IN EVIDENCE.—In a prosecution for murder by beating, several large, vivid, striking, but correct photographs of the decedent's bruised and battered head and face, produced and identified by the physician who made the autopsy, are admissible in evidence, notwithstanding their gruesome and striking presentment of the features of the deceased may excite the horror and indignation of the jury.

ID.—PHOTOGRAPHS OF DECEASED—TAKING TO JURY ROOM.—It is not improper to permit the jury, after such photographs have been introduced in evidence, to take them into the jury room.

ID.—TAKING EXHIBITS TO JURY ROOM—TIME AND MANNER OF OBJECTION THERETO.—Alleged error in permitting the jury to take exhibits to the jury room cannot be urged for the first time on appeal, where the only objection made at the trial was the objection previously made to their introduction in evidence.

ID.—CODE SECTIONS—LIBERAL INTERPRETATION IN PERMITTING EXHIBITS TO GO TO JURY ROOM.—Section 612 of the Code of Civil Procedure, which is identical in terms with section 1137 of the Penal Code, is to be construed as an extension and not a limitation of the common law relating to exhibits, and the court may permit the jury to take with them and use in their deliberations any exhibit, except depositions, where the circumstances call for it.

APPEAL from a judgment of the Superior Court of Marin County and from an order refusing a new trial. E. T. Zook, Judge.

The facts are stated in the opinion of the court.

Martinelli & Greer, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—The defendant was convicted of the crime of murder, and sentenced to imprisonment for life. He appeals from the judgment and order denying his motion for a new trial.

The following are substantially the facts of the case: On the sixteenth day of April, 1913, Ernest Reynaud and Milton

S. Clark, two deputy fish and game commissioners, acting upon information that the fish and game laws were being violated at or near Paradise Cove on the Marin County shore of the San Francisco Bay, went to that place for the purpose of intercepting and arresting violators of the law. They there found two fishermen, named Antone Balestieri and Salvatore Balestieri, brothers, and also uncles of the defendant, engaged in fishing with a net of the size of mesh prohibited by law, and placed them under arrest. Entering the launch these fishermen were using they started with them to San Rafael, the decedent Ernest Reynaud, taking his place in the stern and operating the tiller. They were presently overtaken by another launch in which was the defendant with two other men. The defendant, a young man of the age of twenty-two years, and also a fisherman, though not directly connected with his uncles in the business, had been fishing with his two brothers in the same vicinity. The men under arrest spoke and understood English very imperfectly, and hence asked this defendant to come aboard their launch and act as an interpreter. He was allowed to do so, and seated himself in the stern beside Reynaud. A dispute presently arose between the arrested men and the officers over the request of the former to have taken with them a net other than the illegal net with which it was claimed that they had been fishing, which request the officers refused. This led to an assault upon the arresting officers by the arrested men, during which several shots were fired by the deputies, killing Salvatore Balestieri and wounding this defendant in the hand, and during which also the deputy Reynaud was overpowered and beaten to death, and the deputy Clark driven overboard, narrowly escaping with his life. The defendant testified that he took no part in this affray other than to strive to prevent it and keep the peace. On the other hand the surviving deputy Clark testified that the defendant was one of the two men who attacked Reynaud, and by at least preventing him from making an efficient defense, against his other assailant, was the means of causing his death. After the affray was over the boat, containing the dead bodies of Reynaud and Salvatore Balestieri, was brought to San Francisco by the defendant and his uncle, Antone Balestieri. The latter then disappeared and has not since been found; but the defendant,

on arriving at the wharf about 9:30 o'clock on that night, and suffering from his wound, surrendered to the police, asked for a doctor, and told the story of the homicide, claiming to have been an innocent participant in the affray. The body of Reynaud was taken to the morgue, where the autopsy was held on the following morning, and several large and very vivid and striking, though correct, photographs were taken of the decedent's bruised and battered head and face. Upon the trial of the case these photographs were produced and identified by the physician who made the autopsy, and who testified with much of exact and gruesome detail respecting the extent and nature of the wounds and bruises which the features of the deceased displayed and which the photographs reproduced. The defense objected to the admission in evidence of these photographs, but they were admitted in evidence over the objection. The pistol of Reynaud, which had been found by the police in the boat and which appeared to have been broken during the affray, was also produced by the prosecution and admitted in evidence without objection. Upon the conclusion of the trial and charge, the jury retired, but presently requested that the exhibits, the photographs, and pistol, be allowed to be taken by them to the jury room. To the request for the photographs the defendant objected, basing his objection solely upon his prior objection to their admission in evidence. This objection was overruled, and the photographs and pistol sent to the jury room. The jury returned a verdict presently of murder in the first degree with the penalty of imprisonment for life. The judgment followed the verdict, and from it and from the order denying a new trial the defendant prosecuted this appeal.

The only two points urged by the counsel for appellant upon this appeal are: 1. That the photographs above referred to were improperly admitted in evidence; and, 2. That it was improper and highly prejudicial to allow them to be taken to the jury room, for the reason that their ghastly and gruesome and striking presentment of the features of the dead man was calculated to and did unduly excite the horror, indignation, and prejudice of the jury, and by so doing diverted their sober judgment from a dispassionate consideration of the facts of the case, which, as counsel for the

defendant contends, were not in themselves sufficient to justify the verdict.

As to the first objection, relating to the admissibility of the photographs in evidence, we find it without merit, for it has been settled by numerous and recent authorities in this state and elsewhere that photographs may be used upon the trial "to exhibit particular locations or objects where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where they will conduce to a better or clearer understanding of such testimony." (*People v. Rogers*, 163 Cal. 476, [126 Pac. 143], and cases cited.) It was important in this case that the jury should gain a clear perception of the precise manner in which the decedent came to his death. These pictures served to illustrate the testimony of the witness Clark as to the manner and form of the assault upon his deceased companion. The testimony of the autopsy physician, which was in some respects as striking and gruesome in detail as are these pictures, was properly admissible whether with, or, as in this case, without an objection; and the fact that its striking and gruesome detail might awaken feelings of horror and, perhaps, indignation in the minds of the jury, would not be a sufficient reason for the exclusion of such evidence; otherwise the more horrible a murder the more hampered would be the prosecution of those who had contributed the details of its horror.

The second objection of the defendant, and the one most seriously urged upon this appeal, is that these photographs ought not to have been sent to the jury room. The record discloses that the only objection urged at the trial to the order permitting the jury to take these exhibits, was the former objection as to their original admissibility in evidence. The precise words of the record upon this point are important and instructive. The record reads as follows:

"The Court. I am advised by the sheriff that the jury desires the exhibits, pistol and photographs of the deceased, to be taken into the room. If there is no objection an order will be made that they be taken to the jury room. Any objection?

"Mr. Boyd: No, your honor.

"Mr. Martinelli: We have none to the pistol, but having made an objection to the introduction of the photographs in evidence, we object to them.

"The Court: I mean, there is no objection other than the original objection you made?

"Mr. Martinelli: Yes, we will object to it. In other words, I do not want to be considered as waiving my objection made at the time of the trial.

"The Court: Any other objection?

"Mr. Martinelli: No other objection.

"The Court: Very well. That is all they ask for?

"The Sheriff: The pistol and the photographs.

"Mr. Martinelli: The record of course will show that they were sent to the jury room?

"The Court: Yes. The plaintiff's exhibits, the pistol and the photographs.

"Mr. Martinelli: Of course the record won't show our consent?

"The Court: It will show that you made no objection other than the original objection to the offer.

"Mr. Martinelli: Yes."

In view of the foregoing limitations upon the objection of the defendant at the trial we are of the opinion that his contention, for the first time made in this court, cannot be upheld. But aside from the form of the objection we think that photographs, when rightfully admitted in evidence, may properly be sent to the jury room. Photographs, pictures, diagrams, and like fixed representations to the eye, the details of which would otherwise be properly presentable to the ear in oral testimony, have been held to come fairly within the meaning of the word "papers" used in section 1137 of the Penal Code (*Chicago etc. E. R. Co. v. Spence*, 213, Ill. 220, [104 Am. St. Rep. 213, 72 N. E. 796], and cases cited). But in addition to this, it has been instructively shown by Mr. Justice Henshaw in the recent case of *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, [34 L. R. A. (N. S.) 717, 115 Pac. 313], that section 612 of the Code of Civil Procedure, which is identical in terms with section 1137 of the Penal Code, is to be construed as an extension and not a limitation of the common law rule relating to exhibits, and that "the court may permit the jury to take with them

and use in their deliberations any exhibit (except depositions) where the circumstances call for it." (See, also, *Gresser v. State* (Tex. Cr. App.), 40 S. W. 595; *Grayson v. State*, 40 Tex. Cr. 573, [51 S. W. 246]; *State v. Teale*, 154 Iowa, 677, [135 N. W. 408]; *People v. Morris*, 254 Ill. 559, [98 N. E. 975]; *Puryear v. State*, 50 Tex. Cr. 454, [98 S. W. 258].) The objection that the presence of these photographs in the jury room might tend to unbalance the jury in their deliberations is no stronger than the same objection to their original admission in evidence, especially in view of our conclusion that the evidence in the case was in itself sufficient to justify the verdict; and also in the absence of any affirmative showing that the jury were misled, or that the exhibits were otherwise put to any improper use.

The judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 18, 1914.

[Crim. No. 304. Second Appellate District.—January 23, 1914.]

THE PEOPLE, Respondent, v. LEE RIAL, Appellant.

CRIMINAL LAW—LARCENY AND OBTAINING MONEY BY FALSE PRETENSES

DISTINGUISHED.—In larceny there is no parting with the title to the thing taken, nor intent to part with it, while in false pretenses the person defrauded intends that title shall be divested, but his consent is obtained by fraud.

1D.—CONFIDENCE GAME—FAKE RACES—OBTAINING MONEY TO BET.

Where confidence men fit up a fake pool room and there accept money, a draft and a certificate of deposit from a victim, he intending that it shall be bet on races, and they intending to deprive him of it, without making any *bona fide* bets, the offense is larceny rather than obtaining money under false pretenses.

1D.—INTENT OF OWNER OF PROPERTY—EVIDENCE.—The writing contained in and the indorsements made upon the draft and certificate of deposit do not constitute the only evidence from which the intent of the owner should be ascertained.

- 1D.—APPROPRIATION OF MONEY TO SOME USE—WHETHER NECESSARY TO COMPLETION OF CRIME.—In establishing the commission of the crime, it is not necessary that it should be shown that the property taken was applied to some use by the defendant or his confederates. When possession of the property was obtained through the fraudulent means employed and with intent to deprive the owner thereof, the crime was complete; and the fact that the complaining witness stopped payment on the certificate of deposit after delivery, did not make the act of obtaining possession thereof any the less criminal.
- 1D.—CORROBORATIVE PROOF—NECESSITY.—The prosecution for such offense being one for larceny, it is not necessary that corroborative proof of the kind indicated by the provisions of section 1110 of the Penal Code should be furnished.
- 1D.—OTHER SIMILAR OFFENSES—ADMISSIBILITY OF EVIDENCE.—In such prosecution evidence which tends to show that the defendant has, at prior times, engaged in practices similar to the offense complained of, is properly admitted.
- 1D.—SECONDARY EVIDENCE—PAROL TO SHOW CONTENTS OF DRAFT AND CERTIFICATE OF DEPOSIT.—On the trial for such offense the prosecution need not demand of the defendant the production of the draft and certificate of deposit before offering parol evidence of their contents.
- 1D.—DEMAND OF DEFENDANT TO PRODUCE DOCUMENTS—ERROR INVITED.—If the defendant objects to such testimony as secondary and incompetent, and thereby prompts the district attorney to demand that the defendant produce the documents, the defendant is not in a position to claim prejudice on account of such demand.
- 1D.—SCOPE OF EVIDENCE—WHETHER CIRCUMSCRIBED BY OPENING STATEMENT.—The limit of evidence material to sustain the charge was not circumscribed by the opening statement of the district attorney, especially where the defendant could not have been misled to his prejudice as to the scope of the evidence designed to be produced against him.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

H. H. Appel, and G. R. Horton, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

JAMES, J.—Appellant was charged with having committed the crime of grand larceny. He was convicted and appeals from the judgment entered against him, and from an order denying his motion for a new trial.

It was particularly charged in the information that appellant, on the eighteenth day of February, 1913, in the county of Los Angeles, feloniously stole and carried away forty dollars in money, one draft drawn by the First National Bank of Mascuotah, Illinois, for one hundred dollars, and one certificate of deposit of the First National Bank of the city of Los Angeles for the sum of five thousand dollars, all of which property was alleged to be of the aggregate value of \$5,140. By the evidence it was shown that the complainant was a resident of Illinois and that he came to the city of Los Angeles on a pleasure trip; that at one of the depots he met a man who called himself Reed and with whom he had some friendly converse thereafter; that Reed invited complainant to go to Venice, a seaside town in Los Angeles County, and that while there Reed pretended to recognize a man whom they met on the sands, as a person whom he had seen in the East and who he said had won large sums of money on the races at Minneapolis; that Reed sought to introduce himself to this man, who at first denied that he was the person referred to, but who finally admitted his identity, and the two men chatted for some time about matters of which they claimed to have common knowledge with reference to the city of Minneapolis. Reed requested this man to give to him and complainant the benefit of his knowledge of racing matters and asked him to bet some money for them. The man at first demurred, but finally accepted a small sum from each and together they journeyed to a side street and to a set of rooms upstairs in a building, where there appeared to be a complete betting exchange. There were telegraph instruments in the room which were in operation, or appeared to be so; a blackboard was hung upon the walls with the usual marked spaces for the entering of names of horses and the order in which they ran in the races; and there was a telephone instrument with receivers, which one of the men in the place would use whenever a "race" was to be called. At the insistence of Reed, defendant placed several bets with a man behind the counter, all of which invariably were suc-

cessful. Finally, after the complainant had placed with the man who acted as bookmaker all of the property described in the information, a last bet was made by which all of the winnings were declared to have been swept away. Before this bet was made, a large sum of money was due from the bookmaker to the three men, presumably. They held the race checks ready to "cash in" as soon as the cashier was ready to make payment, which he represented that he would be within a short while. It was then proposed by one of the men other than complainant that another bet be made, but they had no money with which to make it. It was suggested then by Reed or appellant that they could use the checks which they held as cash, and these they did use. The appellant was the man who was supposed to have the inside information on the races, which he pretended to have received through telegrams from the East. He designated what horse should be bet upon for the next race and Reed took the checks to the bookmaker for the purpose of placing the bet. He soon returned where complainant and appellant were, in the room adjoining, and exhibited his ticket. Appellant appeared to be much disturbed when he saw the ticket, saying to Reed that he told him to play the horse for second, and that instead of doing that he had played him for first place. Appellant then went into the pool room for the purpose, as he stated, of changing the bet, but the man at the counter declared that the bets could not then be changed, as the horses were ready to run. The report of the race was soon declared by the man at the telephone, who stated that the horse upon which the men had placed their bet had come in second. Thereupon appellant acted in a hysterical manner, berated Reed violently and struck him over the head; whereupon Reed ran out of the building and away, and at the time of the trial had not again appeared. Complainant being without money cashed a check with the bookmaker, receiving one hundred and ten dollars, and came back to the city with appellant. Appellant urged the complainant to go to Chicago with him that night, to which complainant agreed, and he met appellant at the time and place designated by the latter. At the moment the two men there met, police officers arrived and arrested appellant. A visit to the pool room at Venice disclosed that all of the sporting

paraphernalia had been removed, and also the men connected therewith had betaken themselves off. Evidence was introduced showing that the telephone and telegraph instruments used in the rooms had not been connected with the wires of telephone or telegraph companies, and in fact there was evidence sufficient to warrant the jury in determining that the entire transaction was in furtherance of a scheme devised for the purpose of defrauding credulous persons who could be drawn into the net set for them. The evidence was also sufficient in a circumstantial way to show that Reed and appellant, together with the other persons concerned in the operation of the pretended pool room, acted in concert and pursuant to an understanding had between them.

That the proof showed this to be a case, not of larceny, but of obtaining money by false pretenses, is a proposition which is made the subject of much serious argument in the briefs of appellant. In larceny there is no parting with the title to the thing taken, nor intent to part with it. In false pretenses the person defrauded intends that title shall be divested, but his consent is obtained by fraud. (Bishop's Criminal Law, vol. 2, sec. 808; *People v. Delbos*, 146 Cal. 734, [81 Pac. 131].) Taking the facts of this case as the evidence showed them to be: The complaining witnesses delivered his money and other property to defendant and his confederates for the purpose of having it bet upon a horse race. The scenery of a complete stage of fraud was set up: There was what appeared to be a real pool room in operation; the newly-found friends were not what they pretended to be; the pool room setting was "faked" and no returns from *bona fide* horse races were received there. Consequently the complaining witness, although he intended to bet his money upon horse races, never did in fact so wager it. He may have intended that his property should abide the hazard of the races, but the conditions under which he intended in that event to part with his property were not present. Therefore, it cannot be said that he parted with both the possession and title to his property when he intrusted it to the charge of a confidence operator. The decision in the case of *Miller v. Commonwealth*, 78 Ky. 15, [39 Am. Rep. 194], rested upon facts of a kind similar to those which the evidence illustrates here, and what is there said is particularly

applicable to this case. Quoting from the opinion: "The money was delivered to Smith to be bet for the prosecutor, and there was certainly no intention on his part to give up the money until it should be lost on the game. Until that occurred, he continued to be the owner of the money and might have demanded its return. He had not loaned it to Smith or advanced it to him upon any contract, express or implied, by which Smith became his debtor. The money was in Smith's hands as a mere custodian or agent for the prosecutor. It continued to be the prosecutor's money. It was handed to Smith to be bet for him, and not for the use or benefit of Smith in any way. He no more parted with his property in the money than if instead of going to a faro bank and handing Smith the money to bet for him on the game, they had gone into an auction-room and he had handed the money to Smith to make purchases for him. In this latter case no one will doubt but that if the money had been obtained for the ostensible purpose supposed, but with the actual felonious intention not to use it for that purpose, but to convert it to his own use, he would have been guilty of larceny. (2 Russell on Crimes, 42 et seq.) If it was not the intention of the prosecutor when he handed the bills to Smith, to part with his property in them, but merely to part with the possession for the purpose of having them betted on the game, and Smith received them, not for the purpose of betting *bona fide*, but with the intent to lose them on a fraudulent game concerted between himself and Miller, or between themselves and others, and did so bet and lose the money, Smith was guilty of larceny; and if Miller knew that Smith had obtained the money from the prosecutor to bet against the bank, and by preconcert between himself and Smith, Smith knew which cards would lose and which would win, and it had been agreed that he should bet on those they knew would lose, and this was done with the design to deprive the prosecutor of his money, and he was so deprived of it, Miller is also guilty." To the same effect: *Stinson v. People*, 43 Ill. 397; *People v. Shaw*, 57 Mich. 403, [58 Am. Rep. 372, 24 N. W. 121].

The writing contained in and the indorsements made upon the draft and the certificate of deposit did not constitute the only evidence from which the intent of the owner of

that property should be ascertained. As to the circumstances under which possession was parted with—the proof of the fraud necessarily rested almost wholly in parol. The prosecution being one for larceny, it was not necessary that corroborative proof of the kind indicated by the provisions of section 1110 of the Penal Code should have been furnished. The evidence which tended to show that defendant had engaged in practices similar to that complained of, at prior times, was properly admitted. (*People v. Arnold*, 17 Cal. App. 68, [118 Pac. 729].) The effect of this evidence was carefully limited by the instructions of the trial judge to the jury.

It was not necessary that it should be shown that the property taken was applied to some use by the defendant or his confederates before the crime was made out. When defendant obtained possession of the property of the complainant through the fraudulent means employed and with intent to deprive the owner thereof, the crime was complete; as much so as had he snatched it from the person of complainant and starting to run away was caught and the property taken back. The draft and certificate of deposit at the time they passed into the defendant's possession were valid and their value was the sum that might have been collected thereon, as is provided by section 492 of the Penal Code. The fact that complainant stopped payment on the five thousand dollar certificate of deposit after delivery, did not make the act of defendant in obtaining possession thereof any the less criminal. Furthermore, it appears that the draft for the sum of one hundred dollars was carried away and payment on it was not stopped. The securing of the latter paper alone in the manner charged was sufficient to make out the crime.

Parol evidence was allowed for the purpose of proving the contents of the five thousand dollar certificate of deposit. This document was delivered to the man behind the desk at the "pool room." Having passed into the possession of the accomplice of defendant, as the jury had the right to conclude it had, the prosecution was not required to demand of defendant its production before offering parol evidence as to its contents. This proposition is fully sustained by all of the authorities. At one point in the course of the trial the district attorney made demand that the defendant

produce the one hundred dollar draft which it was claimed the complaining witness had delivered to him. This demand was prompted by the fact that appellant had objected to questions asked by the prosecutor of the complaining witness touching the contents of the draft, appellant's claim in that regard being that it was improper to allow oral proof to be made of the contents of a written document. The district attorney then stated that he demanded of defendant the production of the draft. Counsel for appellant then objected to the demand, the grounds of his objection as stated by him being that the district attorney had not, in his opening statement, claimed that appellant had ever had possession of the moneys or the draft mentioned in the information, concluding his objection with these words: "And I assign his conduct in so doing as error, and as having been done purposely for effect." Proof was made that the draft in question had been delivered to appellant, and that he had in turn delivered it to the pretended bookmaker. When these facts appeared it was the prosecutor's privilege to make proof of the contents of the draft by parol without demanding that appellant produce the document, but his demand in that regard was prompted by the objection of counsel that such evidence would be secondary and incompetent. Under this state of the record appellant is not in a position to claim prejudice, for it was by reason of his own objections that the prosecutor was led to make the demand complained of. This case is different in its facts from the case of *Gillespie v. State*, 5 Okl. Cr. 546, [Ann. Cas. 1912D, 259, 115 Pac. 620], cited by appellant. A further observation may be made on this question: It will be noted that appellant's only ground of objection to the demand of the district attorney was that the prosecutor in his opening statement had not claimed that the draft had gone into the possession of appellant. The limit of evidence material to sustain the charge was not circumscribed by the opening statement of the district attorney, especially where appellant could not have been misled to his prejudice as to the scope of the evidence designed to be produced against him. At the time the objection mentioned was made the trial had only fairly commenced, with complainant as the first witness on the stand under examination. The trial judge was not guilty

of prejudicial misconduct. His attitude, as it is represented in the record, was one which showed a scrupulous appreciation of the duties of a judge as distinguished from those of the jury.

A number of other errors are assigned, many relating to the admission of evidence, the giving and refusing to give certain instructions to the jury. These have all been carefully examined and considered. In the view that is taken of them, they do not demand extended or detailed discussion. As a whole, the instructions given to the jury seem to cover the case fully and to declare the law correctly. The instructions, when read together, present no state of misleading conflict. In some particulars they seem to be more favorable to the defendant than he was entitled to expect or demand.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on February 21, 1914, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal was denied by the supreme court on March 23, 1914.

[Crim. No. 477. First Appellate District.—January 28, 1914.]

THE PEOPLE, Respondent, v. ELMER PRATHER,
Appellant.

CRIMINAL LAW—FORGERY—EVIDENCE OF CONDUCT AND TRANSACTIONS LEADING UP TO CRIME.—Where it appears on a prosecution for forging travelers' checks that the defendant and his associate had acted in concert throughout a general scheme to relieve the complaining witness of whatever of value he possessed, including the checks, and to turn the latter into money by whatever criminal means might be required, the prosecuting witness may testify of a conversation which he had with the defendant's associate before the defendant appeared on the scene, and also of conversations and conduct after the defendant joined his associate and the complain-

ing witness, before the acquisition and forgery of the checks, as to the laying of illegal bets on a horse race, in the course of which the complaining witness lost all his ready money.

1D.—INDORSEMENT OF TRAVELER'S CHECK—INDICTMENT FOR FORGERY—VARIANCE.—Where an information charges the forgery of "a certain indorsement" of a traveler's check, and the evidence shows that the forged signature was written, not on the back of the check, but on the face thereof at the place indicated as essential to its transfer, there is no variance between the information and the proof.

1D.—NEGOTIABLE INSTRUMENT—INDORSEMENT ON FACE.—The writing of the name of the payee of a traveler's check on its face, at the place indicated thereon as essential to its transfer, constitutes an indorsement thereof within the intendment of section 3108 of the Civil Code.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. Fred V. Wood, Judge presiding.

The facts are stated in the opinion of the court.

Burns & Watkins, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

RICHARDS, J.—This is an appeal from a judgment of conviction of appellant, who was charged with the crime of forgery, and from an order denying his motion for a new trial.

The first contention of appellant is that the court erred in permitting the prosecuting witness Thompson to testify to a certain conversation with a man named Rock on the streets of Oakland out of the hearing of the defendant and before he had appeared upon the scene; the second contention of the appellant is that the court erred in admitting the evidence of said Thompson as to certain conversations and conduct after he had joined Rock and Thompson, but before the transactions out of which this case arose, as to the laying of certain illegal bets on a horse-race, in the course of which Thompson lost all of his ready money. The appellant contends that the evidence of this episode amounted to an attempt to prove another, separate and distinct offense from that with which the appellant is charged herein, to

his prejudice in the present case. These two contentions of the appellant may be considered together since they each involve a review of the evidence in the case for the purpose of determining what the relationship, intent, and conduct of the defendant and of the absent Mr. Rock were in respect to Thompson, and to the particular offense of which the defendant stands convicted.

A careful perusal of the record convinces us that the following facts were fairly deducible by the jury from the evidence in the case:

Prather and Rock had known each other for some time prior to the occurrence out of which the arrest of the former arose. They had been playing the races together, and were well enough acquainted and acting sufficiently in concert for Prather to regard and speak of Rock as his "friend" or "partner." Rock was already known to the police of San Francisco as a suspected buncoman whose presence in that city was not desired. The pair were together in Oakland on the afternoon of March 24, 1913; and in view of their conduct in the affair of Thompson, were on the look-out for a victim to fleece. Rock accosted Thompson, whom he found to be a stranger in town, and at once became chummy and offered to show him the "fifty million dollar hotel." They walked up the street together with Prather evidently hovering near. The talk between Rock and Thompson before Prather joined them, the admission of which was objected to by the defense, does not seem to have been harmful to any material degree. It simply led up to the opportune moment for introducing the defendant into the scene. The way in which Prather was presented to Thompson, as a man whom Rock had known in Denver, was in itself a false and fraudulent pretense, shedding a strong light on the criminal purpose with which the pair were attaching themselves to Thompson. They presently began to discuss the subject of betting on the races, and induced Thompson to join them in laying a small wager. This was an easy and not unusual method of finding out what money Thompson had. The first play was successful, and naturally led to another and larger venture, involving all the money which Thompson had upon his person; and this, of course, he lost. The defendant objected to the admission of the evidence of this

episode upon the ground that it amounted to proof of a separate, distinct and antecedent offense unconnected with the crime of forgery with which the defendant is charged in this case. But it does not require either a close reading or strained construction of the record to discern that the subject of playing the races was presented and pursued merely as a progressive step in the art of separating Thompson from whatever of value he possessed. When the pair had thus procured all of Thompson's ready money, Prather, who had received it, went off, so that if their victim made trouble the holder of their ill-gotten gains would be out of his way. Rock stayed with Thompson to ply him with liquor, keep him free from suspicion, and discover whether he had anything else of value of which he could be relieved. He presently found that Thompson had a number of travelers' checks, issued by Wells, Fargo & Co., of which the instrument set forth in the information is a sample, and which aggregated in value the sum of two hundred and sixty dollars. He assisted in the passing of one of these checks in a saloon during the evening, and thus saw that the signature of Thompson was essential to their transfer. Then he succeeded in enticing their apparently intoxicated possessor to a strange room, where he presently got possession of the checks and then went away. The next morning Rock and Prather are seen together, with the latter in possession of the checks. They go to the pawnshop of the witness Bernstein, where Rock wishes to redeem an overcoat. The name of Thompson had been written on some of these checks in the meantime, though by which of them does not appear, except that Prather stated to one of the arresting officers later that he saw Rock writing Thompson's name on some of these checks. When the check in question here was offered to Bernstein it came from the possession of Prather, who then vouched for its validity, and thus procured its passage to Bernstein. A little later in the same day the pair met Thompson on the street. He was looking for Rock, whom he had been sober enough to see extract his checks from his pocket in the room on the night before, and from whom he now demanded them. Here occurred another chapter of the same sort of dissimulation as that attending their first meeting with Thompson, and from which the concert

of criminal purpose between Rock and Prather is plainly to be discerned. They inveigle Thompson into a saloon and there create a confusion, in the course of which they succeed in slipping away. They are next seen together in San Francisco two or three days later, where Prather, in order to deceive the police into thinking him a man of consequence, exhibits the remainder of these checks as "his credentials." They prove his undoing, and cause his detention and transfer to the custody of the Oakland police, to whom he makes a number of statements in the effort to cast the odium on Rock, who has escaped, but which only serve to enmesh himself by showing that he knew the character of Rock and that he had stolen these checks, and that the name of Thompson had been forged to them at the time he undertook to give them currency.

From the foregoing statement of the evidence it was a reasonable deduction for the jury to draw that Prather and Rock were acting in concert throughout, and hence that all that was said and done from the time Thompson first was sighted was but a part of their general scheme to relieve him of whatever of value he possessed, including these travelers' checks, and to turn the latter into money by whatever criminal means might be required. This disposes of the appellant's first two objections adversely to his contention.

The next and most serious contention of the appellant is that there is a fatal variance between the information and the proof in the following essential respect: The information charges the defendant with having feloniously made and forged "a certain indorsement" of the travelers' check in question "by then and there falsely indorsing thereon the name of A. Thompson" and the word "bearer"; and with having uttered and passed the said check to Morris Bernstein as true and genuine, knowing the said indorsement of said check to be false and forged. The instrument in question is set forth in full in the information. It is in the usual form of the so-called travelers' checks issued by Wells, Fargo & Co., and had a face value of ten dollars. Omitting the nonessentials it reads substantially as follows: "Wells, Fargo & Co. at its paying agencies will pay to the order of _____ ten dollars." In the upper right-hand corner

of the instrument are the words "when countersigned below with this signature." The person to whom such checks are issued is required to write his name under the above words, which also require that he shall again write the same name in the lower right-hand corner of the check under the word "countersigned," before presenting the check for payment or transferring it to another. It was this lower signature of A. Thompson, the original holder of the check, which the defendant was charged with having forged and with having issued knowing such name to be forged. When said travelers' check was offered in evidence it was objected to by the defendant upon the ground that the said lower signature of A. Thompson, even if conceded to have been forged, did not constitute an "indorsement" within the legal meaning of the term, and hence that there was a fatal variance between the information and the proffered proof. The evidence having been admitted he makes the same contention here.

The instrument in question is called a "Travelers' check," but is, more properly speaking, not of the form or effect of a check, but rather of a bank note, and is a negotiable instrument. When issued it was payable "to the order of _____." This being so, it was payable to bearer when properly signed at the place indicated by the original holder to whom it was issued (Daniels on Negotiable Instruments, 5th ed., sec. 145). The insertion of the word "bearer" in the blank space in the body of the check was therefore not material to its validity or transfer to another than the original payee; but the writing of the name "A. Thompson" in the lower right-hand corner of the face of the instrument was by its express terms, made essential to its transfer from the original holder to another payee. The Civil Code defines indorsement as follows: "One who writes his name upon a negotiable instrument otherwise than as maker or acceptor and delivers it with his name thereon to another person is called an indorser, and his act is called indorsement." (Civ. Code, sec. 3108.) It is true that the word "indorsement" comes from a Latin compound meaning "on the back"; and it is also true that the sections of the Civil Code immediately following the section above quoted seem to contemplate that an indorsement of a negotiable

instrument should be on its back or on a separate paper attached to it; but the supreme court of this state, with section 3108 of the Civil Code expressly in view, has declared that "the indorsement may be made on the face of the note with the same effect as if made on the back." (*Shain v. Sullivan*, 106 Cal. 208, [39 Pac. 606], and cases cited.) This being so, the conclusion would seem to be irresistible that the writing of the name of A. Thompson, the original holder and payee of this instrument, on its face constituted an indorsement within the plain intendment of section 3108 of the Civil Code. It was the signature of the original holder of the instrument expressly required to give effect to its delivery and validity to its transfer to another payee; and hence its forgery, or the uttering, publishing, and passing of such instrument as true and genuine, knowing that the said signature of A. Thompson was forged, would constitute the offense charged in the information. There was therefore no variance between the terms of said information and the instrument when proffered and admitted in proof.

The judgment and order denying a new trial are affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 27, 1914.

[Civ. No. 1307. First Appellate District.—January 28, 1914.]

FREDERICK J. RUSSELL, Appellant, v. ISABELLA J. CHISHOLM et al., Respondents.

APPEAL—AUTHENTICATION OF TRANSCRIPT—ABSENCE OF JUDGE'S CERTIFICATE.—A transcript on appeal from an order granting a motion for a new trial which contains no certificate of the judge that the papers and records included in the transcript are any or all of those used upon the hearing of the motion, is insufficient under either the old or new method of perfecting and presenting the record on appeal, although the transcript has attached to it the certificate of the clerk that the papers and orders therein contained are true copies of the originals on file in his office.

APPEAL from an order of the Superior Court of Alameda County granting a new trial. William S. Wells, Judge.

The facts are stated in the opinion of the court.

Z. N. Goldsby, for Appellant.

Reed, Black, Reed & Bingaman, for Respondents.

RICHARDS, J.—This is an appeal from an order granting the motions for a new trial of defendants Chisholm and Gray. The respondents stand at the threshold of this appeal objecting to its consideration upon the merits on the ground that no properly authenticated transcript on appeal has been perfected or filed. The transcript on appeal herein has attached to it the certificate of the clerk of the superior court from which the appeal is taken, “that the papers and orders therein contained are true, full and correct copies of the originals on file and of record in this office, and of the whole thereof, together with the proof of service and filing thereof, and the indorsements thereon”; but there is no certificate of the judge of the court that the papers and records which the transcript contains were any or all of the papers or records which were used upon the hearing of the motion for a new trial. That a transcript lacking such certificate is insufficient under either the old or new method of perfecting and presenting the record on appeal, is settled under the authority of *Thompson v. American Fruit Co.*, 21 Cal. App. 338, [131 Pac. 878], and cases therein cited.

It follows that the respondent's objection to the further consideration of this appeal must be held to be well taken.

The order is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 313. Second Appellate District.—January 29, 1914.]

THE PEOPLE, Respondent, v. JOE PRINCIPE et al.,
Appellants.

CRIMINAL LAW—ARSON—BURNING INHABITED BUILDING IN NIGHT-TIME—BURDEN OF PROOF.—In order to sustain a conviction, under the provision of section 454 of the Penal Code that "maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree," the burden is upon the prosecution affirmatively to show that at the time the fire was kindled there was some human being other than the accused actually within the building.

ID.—PRESENCE OF HUMAN BEING—ABSENCE OF EVIDENCE—INSTRUCTIONS.—In a prosecution for arson in burning an inhabited building in the night-time, it is error to instruct the jury that they may find the defendants guilty of either degree of the crime charged, where there is a total lack of any evidence that there was any human being in the building at the time the fire was kindled.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

C. V. Riccardi, J. T. Breen, and Antonio Orfila, for Appellants.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

JAMES, J.—Defendants were informed against by the district attorney for the crime of arson, the burning being alleged to have been that of a building in which there were at the time human beings and as having occurred in the night-time. The jury returned a verdict finding both defendants guilty, and determined the crime to be of the first degree. A judgment directing the imprisonment of defendants for a long period of years followed, and this appeal was taken from that judgment and from an order made denying the motion of defendants for a new trial.

The principal contention made by appellants on this appeal is that the evidence was insufficient to warrant the jury in convicting appellants of arson of the first degree. Section 454 of the Penal Code provides as follows: "Maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree. All other kinds of arson are of the second degree." It appears from the transcript of the evidence as made by the phonographic reporter that one Trepini occupied the building which was burned as a dwelling-place for himself and family, which consisted of a wife and son; that having received certain "black-hand" letters, he employed appellants as watchmen to guard his residence during the night-time, as he in the pursuit of his business was obliged to leave at about 2 o'clock every morning; that upon the night of the fifteenth day of June, 1913, he left the premises at the accustomed hour and saw appellants both there in the yard at the time; that later he returned and found his house in ruins. There was other evidence, in its nature circumstantial, which tended to connect appellants with the burning of the building. However, there was a total lack of any evidence showing that after Trepini left the house on the night mentioned any other person remained therein, or that there was any other person therein at the time the fire was kindled. Under this state of the proof, the trial judge instructed the jury that if it determined that the defendants or either of them were guilty, that the degree of the crime should be fixed and the two degrees were by the same instruction defined. Under the proof made the appellants could not properly have been convicted of arson of the first degree. The burden was upon the prosecution to affirmatively show, in order to sustain such a verdict, that at the time the fire was kindled there was some human being other than appellants actually within the building. The court erred in giving the instruction which advised the jury that they might find the defendants guilty of either degree of the crime charged, and the evidence did not sustain the verdict.

It is contended that the court erred in the matter of refusing to give certain instructions asked for by the defendants, but an examination of those alleged errors does not show that they were sufficient in themselves to warrant the

criticism as to their prejudicial character. It would have been perhaps better had the court given a fuller instruction as to the presumption of innocence which accompanies a defendant throughout the trial and until his guilt is established beyond a reasonable doubt, although the very brief instruction as given touching that matter, when properly analyzed, may be said to comprehend the same meaning. Nevertheless, a fuller exposition of the rule might have aided the jury to a better understanding of the effect of it.

For the reasons given, the judgment and order are reversed.

Conrey, P. J., and Shaw, J, concurred.

[Crim. No. 482. First Appellate District.—January 30, 1914.]

THE PEOPLE, Respondent, v. WILLIAM HALES,
Appellant.

CRIMINAL LAW—HOMICIDE—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.—In this prosecution for homicide the verdict of the jury that the deceased came to her death by violence inflicted by the defendant, not by cocaine administered by herself, is sustained by the evidence, circumstantial and expert, although there is conflict in the latter.

ID.—CORPUS DELICTI—BURDEN AND MANNER OF PROOF—CIRCUMSTANTIAL EVIDENCE.—In a homicide case the burden is on the prosecution to establish the *corpus delicti* to a moral certainty and beyond a reasonable doubt, but it may do so either by direct or circumstantial evidence, and the sufficiency of either or both depends largely upon the character of the individual case.

ID.—CONFLICTING EVIDENCE—RIGHT OF JURY TO REJECT TESTIMONY.—In the presence of a conflict of evidence in a homicide case, however created, the jury is at liberty to reject that which it deems unworthy of credence.

ID.—CIRCUMSTANTIAL EVIDENCE—WEIGHT AS COMPARED WITH OTHER TESTIMONY.—The law does not belittle the value of circumstantial evidence by making a relative distinction between it and direct evidence, nor give a sanctity or an influence to the mere opinion of an expert witness greater or more controlling than that which it accords to circumstantial evidence.

LD.—EXPERT TESTIMONY—CREDIBILITY AND WEIGHT.—The opinion of an expert witness is neither conclusive nor controlling beyond its weight, which must be ascertained by the same rules ordinarily applied to the reception and consideration of all other evidence, whether it be direct or circumstantial.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. Frank H. Dunne, Judge.

The facts are stated in the opinion of the court.

George E. Price, and John F. Brady, for Appellant.

U. S. Webb, Attorney-General, for Respondent.

LENNON P. J.—The defendant in this case was charged with the crime of murder, convicted of manslaughter, and sentenced to five years' imprisonment in the state prison at San Quentin. He has appealed from the judgment of final conviction and from an order denying a new trial.

The only point presented for a reversal is the alleged insufficiency of the evidence to warrant the verdict and support the judgment.

Briefly stated, the circumstances leading up to and immediately attending the killing of the deceased were these: The defendant was a sailor. The deceased was a woman of the underworld. She had been consorting and carousing with the defendant for several days. The carousal culminated in a quarrel, which eventually developed into a physical encounter, during which the defendant repeatedly beat the deceased with his clenched fists about the head and body, and finally felled her with a blow upon the jaw. While the deceased was prostrate the defendant with his booted foot kicked her viciously and violently in the small of the back and also in the region of the groin. As a result of the beating the deceased received at the hands of the defendant she was badly bruised about the face and breast. The kicking which she received discolored her back, hips, and limbs, and inflicted a bruise the size of a saucer upon her abdomen and above the pelvic bone which extended downward to a point just to the right of the vagina. The deceased was physic-

ally unable to regain her feet for some little time after the assault upon her, but when she did recover from the shock of the brutal beating administered to her she sought shelter in the apartment of her friend, where, after a day and a night of suffering from intense pain in the region of the groin, accompanied by a continuous vomiting and purging of the bowels, she was found dead upon the floor.

Without narrating the details of the testimony given by several witnesses who were called, and who testified for the people upon other phases of this case, it will suffice to say that such evidence shows that the deceased had been addicted to the cocaine habit; that her cravings for the drug were usually satisfied by means of a hypodermic injection; that when she entered the apartment in which she died she had on her person about two grains of powdered cocaine; that she attempted to snuff a portion of the powdered drug, but failed because of the clogged condition of her nostrils; that a locked tin box containing cocaine and a cocaine outfit belonging to the friend of the deceased was found in the apartment.

Dr. David E. Stafford, autopsy surgeon to the coroner of the city and county of San Francisco, was called as a witness for the people. He had performed the autopsy upon the body of the deceased, and upon direct examination testified that when he had completed the autopsy he was unable to determine the cause of death. The autopsy, however, showed "a hyperaemia of the brain and of the lungs and kidney and liver, which were usually found in poisoning cases." Thereupon he caused the removal of the stomach, liver, kidneys and a portion of the brain of the deceased, for the purpose of a toxicological examination, upon the theory that the deceased had died as the result of cocaine poisoning. The result of that examination was negative, that is to say, it did not reveal even a trace of cocaine or any kind of poisoning. Notwithstanding the result of the chemical analysis this witness, upon cross-examination by the defense, testified that in his opinion the deceased had died as the result of cocaine poisoning. Upon redirect examination the witness declared that he had arrived at the conclusion that the death of the deceased was due to poisoning of some kind by a process of elimination; in other words, the

autopsy not having satisfied him that the deceased died as the result of the beating administered to her, he concluded that her death was due to poisoning. He declared further that he knew of no method of positively proving the presence of cocaine in the human system except by a toxicological examination; and that his conclusion as to the cause of death in the present case was based solely upon the hyperaemic condition revealed by the autopsy of the brain, lungs, kidney, and liver of the deceased. The witness defined hyperaemia to mean "a congestion—that is an organism or an organ overcrowded with blood." He admitted that such a condition might partially exist in cases where death results from causes other than cocaine poisoning; and gave as an instance the congestion of the lungs resulting from pneumonia. He insisted, however, that a condition of general hyperaemia, such as he had found in the various organs of the deceased, could not result from any cause save the presence of poison of some kind.

We have purposely omitted several details which might be used to point claimed contradictions, inconsistencies, and uncertainties in the testimony of the witness under discussion; and it will be noted in passing that the record does not show that the fact that the deceased was addicted to the cocaine habit was considered by him, hypothetically or at all, in arriving at a conclusion as to the cause of death.

Dr. Charles E. Swartz, a physician, was also called as a witness for the people. He described generally the condition of the body of the deceased as it appeared to him shortly after her death; and then in response to a hypothetical question, which called for his opinion as to whether a kick in the groin such as the deceased received would cause death, testified that if such a kick "were administered, and an individual not expecting it, so that the muscles of the abdomen would be relaxed at the time, the internal injuries received are sufficient to cause death and not leave a mark on the body at all to be noticed."

Aside from minor matters, the foregoing constitutes a sufficient summary of the evidence upon which the people rested and secured a conviction. The defense offered no testimony, but relied for an acquittal solely upon the contention that the evidence adduced on behalf of the people

showed that the death of the deceased was due to cocaine poisoning, and did not result from the beating and kicking administered to her by the defendant.

It is now suggested that the opinion of Dr. Stafford, the surgeon who performed the autopsy, was the only evidence in the case concerning the cause of death which could be rightfully considered by the jury, and that therefore such evidence was conclusive, and in and of itself sufficient to compel a verdict of not guilty.

With this contention we cannot agree. Undoubtedly the burden was upon the prosecution to establish the *corpus delicti* by proof to a moral certainty and beyond a reasonable doubt that the deceased died as the result of injuries willfully and unlawfully inflicted upon her by the defendant. The *corpus delicti*, however, may be established either by direct or circumstantial evidence; and the sufficiency of either or both depends largely upon the character of the individual case in hand. In the present case the prosecution, for proof of the elements of the crime charged, were compelled to rely upon circumstantial and opinion evidence, which, in its entirety, was sufficient, we think, to support the verdict and judgment. The fact that one of the witnesses for the prosecution gave testimony which, if believed, would have met and overcome uncontroverted facts and circumstances that ordinarily and naturally would have justified a finding that the deceased came to her death as the result of violence, does no more than create a conflict in the evidence adduced upon behalf of the people. The situation, then, is no different from that usually created by a conflict between the evidence of the people and the defense; and in the presence of a conflict of evidence, however created, the jury is at liberty to reject that which it deems unworthy of credence. The law does not belittle the value of circumstantial evidence by making a relative distinction between it and direct evidence, and we are not aware of any rule of evidence which gives a sanctity or an influence to the mere opinion of an expert witness greater or more controlling than that which it accords to circumstantial evidence. In short, the opinion of an expert witness is neither conclusive nor controlling beyond its weight, which must be ascertained by the same rules ordinarily applied to the reception and consideration of all

other evidence, whether it be direct or circumstantial. The exigencies of the present case do not require us to determine whether or not, standing alone, the particular circumstances attending the killing of the deceased in the present case, would have sufficed, in the face of an expert opinion to the contrary, to support the finding of the jury implied from the verdict that the deceased came to her death as the result of violence at the hands of the defendant. We do decide, however, that all of the circumstances attending and bearing upon the death of the deceased, coupled with the opinion of Dr. Swartz that a kick in the groin, such as was administered to the deceased by the defendant, could have produced death, created a substantial conflict in the evidence amply sufficient to support the verdict.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on March 31, 1914.

[Civ. No. 1329. First Appellate District.—January 30, 1914.]

A. R. BROWN, Respondent, v. MANUEL MARTIN,
Appellant.

JUDGMENT—OPENING DEFAULT—DISCRETION OF COURT—REVIEW ON APPEAL.—The action of a trial court, upon an application to set aside a default and grant relief from the judgment based thereon, rests so largely in the discretion of that court that its action in refusing to grant the application will not be disturbed on appeal, unless the record clearly shows that such discretion has been abused.

ID.—RELIEF FROM DEFAULT—LIBERALITY OF PRACTICE UNDER SECTION 473 OF THE CODE OF CIVIL PROCEDURE.—Trial courts should be liberal in the application of the remedial provisions of section 473 of the Code of Civil Procedure to litigants in default, to the end that causes may be presented and tried upon their merits; and where the parties in default have appeared promptly, apparently in

good faith, and have tendered proper pleadings, raising issues going to the merits of the action, applications to set aside their default arising from their excusable neglect ought to be granted.

ID.—DEFAULT AGAINST FOREIGNER—REFUSAL TO OPEN—ABSENCE OF DEFENSE ON MERITS.—It is not an abuse of discretion to refuse to set aside a default in an action for forcible entry and unlawful detainer, notwithstanding the defendant is a foreigner without ability to read or write English and appears promptly and shows that his default occurred through his ignorance of the importance of the precise date of service of process upon him, where there is no showing that he possesses or pleads a sufficient defense to the action upon the merits.

ID.—FORCIBLE ENTRY AND DETAINER—PLEADING—INSUFFICIENCY OF ANSWER TO TENDER ISSUE.—Where the complaint in an action for forcible entry and unlawful detainer alleges that on a certain date the plaintiff was in the peaceable possession of certain land, and that on that date the defendant, forcibly, unlawfully, and wrongfully entered upon and has since retained possession of the premises, and the answer admits the taking and holding of such possession, but denies that the defendant did so "forcibly, unlawfully or wrongfully," these adverbial forms of denial are not sufficient to tender any issue as to the rightfulness or legality of the defendant's entry.

ID.—PRIOR PEACEABLE POSSESSION OF PLAINTIFF—ANSWER—DENIAL UPON WANT OF INFORMATION AND BELIEF.—A denial, upon want of information and belief, of the averment of the prior peaceable possession of the plaintiff, is insufficient. The defendant in an action for forcible entry and unlawful detainer, being charged with notice and put upon inquiry as to the possession of and right of possession in and to the property he is invading, cannot in such action predicate his denial of the plaintiff's alleged peaceable possession upon his want of information and belief.

ID.—ENTRY UNDER CLAIM OF RIGHT—ANSWER—INSUFFICIENT SHOWING.—An allegation in the answer in such action that the defendant bought the pasture upon the premises from some person, whom he names, but does not show to have had any interest in the premises or any right to dispose of its pasture or possession, fails to show entry upon any sufficient claim of right.

ID.—DEFAULT JUDGMENT—RELIEF FROM AFTER SATISFACTION.—The fact that a default judgment is satisfied before application is made to set aside the default does not bar the remedy.

APPEAL from an order of the Superior Court of Fresno County refusing to set aside a default. Geo. E. Church, Judge.

The facts are stated in the opinion of the court.

Burns & Watkins, and John G. Covert, for Appellant.

Everts & Ewing, for Respondent.

RICHARDS, J.—This is an appeal from an order denying the motion of appellant to set aside a default and relieve him from a judgment by default. The action is for forcible entry and unlawful detainer. The complaint was filed and the summons issued and served on the defendant on October 18, 1912. The summons contains a provision directing the defendant to appear and answer within three days after service, or that judgment will be taken against him. The defendant did not so appear, and on October 22, 1912, the plaintiff procured his default to be taken and judgment to be entered against him for the restitution of the premises and for the sum of three hundred and seventy dollars damages, and for costs. On October 22, 1912, after such default and judgment, the defendant undertook by counsel to serve and file a demurrer, and then for the first time learned of such default and judgment. He immediately and on that day gave notice of a motion to set aside the default and judgment, and presented with said notice of motion several affidavits of defendant and his counsel tending to show mistake, inadvertence, and excusable neglect in permitting said default; and also presented and offered for filing his demurrer and answer. The affidavits of defendant and his counsel set forth that the defendant had been actually served with process on Friday, October 18, 1912; that the defendant is a Portuguese sheep-owner and herder who is unable to read or write; that on Monday, October 21, 1912, he brought the papers with which he had been served to the office of his counsel, and then and there informed them, by mistake, that the papers had been served upon him on Saturday, October 19, 1912, which mistake arose innocently and through his ignorance and inadvertence and want of understanding of the importance of the precise date of service; that his counsel relied upon this statement, and made ready the papers for defendant's appearance on October 22, when they found, too late, that their client's default had been taken and a judgment entered against him. Upon the hearing of the

motion the plaintiff presented the counter affidavit of one of the attorneys for plaintiff, who deposed to having been present at a street conversation between the defendant and one of his attorneys on October 23, 1912, in which the defendant asserted that he had told his attorneys at the time he brought the papers to them that they had been served upon him on the eighteenth day of October. This affidavit was not disputed by any counter affidavit on the part of the defendant at the hearing of the motion. The court denied said motion, and from its order in that respect this appeal has been taken.

It is a well settled rule that the action of the trial court upon an application to set aside a default and grant relief from the judgment based thereon, rests so largely in the discretion of that court that its action in refusing to grant such application will not be disturbed unless the record clearly shows that such discretion has been abused. (*Williamson v. Cummings*, 95 Cal. 652, [30 Pac. 762]; *Harbaugh v. Honey Lake etc. Co.*, 109 Cal. 70, [41 Pac. 792]; *Ingrim v. Epperson*, 137 Cal. 370, [70 Pac. 165]; *Staley v. O'Day*, 22 Cal. App. 149, [133 Pac. 620].)

It has also been held in numerous cases that trial courts should be liberal in the application of the remedial provisions of section 473 of the Code of Civil Procedure, to litigants in default, to the end that causes should be presented and tried upon their merits; and in this connection and in recent cases the courts of last resort have gone far in holding that where the parties in default have appeared promptly, apparently in good faith, and have tendered proper pleadings, raising issues going to the merits of the action, applications to set aside their default arising from their excusable neglect ought to be granted. (*Mitchell v. California etc. S. S. Co.*, 156 Cal. 576, [105 Pac. 590]; *Jergins v. Schenck*, 162 Cal. 747, [124 Pac. 426]; *Broderick v. Cochran*, 18 Cal. App. 202, [122 Pac. 972]; *Davidson v. All Persons*, 18 Cal. App. 723, [124 Pac. 570]; *Nicoll v. Weldon*, 130 Cal. 667, [63 Pac. 63], and cases cited.)

In the case at bar it may be conceded that the affidavits presented upon the hearing of the motion tended very strongly to support the view that the defendant and his counsel were acting in good faith in the premises, and that the failure to appear within the time limited by the summons was

due to the fact that the defendant was an ignorant Portuguese who neither read nor wrote in English, and who did not appreciate the importance of precise dates under summary proceedings in forcible entry and unlawful detainer, and hence honestly, though ignorantly, misled his counsel as to the true date of the service of process upon him. Under such circumstances, if the defendant appears promptly with a motion to set aside the default, and with an affidavit of merits or verified answer sufficient in form and substance to present the showing of a substantial defense to the action upon the merits, it would be more consistent with a liberal application of the section of the code in question to grant than to deny such motion; especially if it appears that the plaintiff will not suffer any material injury or inconvenience from the delay incident to the trial of the cause upon its merits. When, however, the record in the case at bar is examined it will be found that while the defendant did appear promptly, and did make a showing indicating that his default occurred through his inadvertence and excusable neglect, it also quite clearly discloses that the defendant neither possessed nor pleaded a sufficient defense to the action upon the merits.

The complaint alleges that the plaintiff on a certain date and for five days prior thereto was in and was entitled to the peaceable possession of a certain section of land in Fresno County; and that on the date mentioned the defendant forcibly, unlawfully, and wrongfully entered upon and took and has since retained possession of said premises, to the damage of plaintiff in a stated sum. The answer of the defendant admits the taking and holding of such possession; but denies that he did so "forcibly, unlawfully or wrongfully." These adverbial forms of denial are not sufficient to tender any issue as to the rightfulness or legality of the defendant's entry upon the premises in question.

The answer of the defendant also undertakes to deny the plaintiff's averment of his prior peaceable possession, basing such denial upon the defendant's want of information or belief. A denial of the alleged peaceable possession of premises cannot be predicated upon the want of information and belief in a defendant encroaching thereon without a show of right. All real property is presumed to be in the possession of some one; and every person encroaching upon such possession must

be held to have notice thereof and to be thereby put upon inquiry as to the claim of right upon which such possession rests. The defendant in an action for forcible entry and unlawful detainer, being thus charged with notice and put upon inquiry as to the possession of and right of possession in and to the property he is invading, cannot in such action predicate his denial of the plaintiff's alleged peaceable possession upon his want of information and belief. (Washburn on Real Property, 6th ed., sec. 2201; *McCormick v. Bailey*, 10 Cal. 230; Sutherland on Code Pleading, sec. 472.)

Furthermore, the defendant herein fails in his answer to base his attempted entry upon the premises in question upon any sufficient claim of right. His allegations in that respect are that he bought the pasture thereon from some person whom he names, but does not show to have had any interest in the premises, or any right to dispose of its pasture or possession. The only remaining denials of the defendant's proffered answer refer to the plaintiff's claim of damages. The complaint avers the rental value of the land to be three hundred dollars, and also avers that the plaintiff was damaged by the unlawful acts of the defendant in driving a large band of sheep upon the land and destroying its pasture, in the sum of three hundred dollars. The answer denies that the rental value of the premises is three hundred dollars, or any greater sum than twenty dollars, and denies that the plaintiff suffered any damage from the ingress of his sheep; but the defendant also in his answer expressly admits that he drove his sheep upon the land and that they did eat off its pasture; and also expressly avers that he had paid the person from whom he claims to have bought the right of pasture the sum of two hundred and twenty-four dollars for the same. It is difficult to see how, in view of these admissions on the part of the defendant, he could have resisted a motion for judgment on the pleadings for his eviction and for actual damages in at least the sum of two hundred and twenty-four dollars, which damages, under the sections of the code governing such actions, could have been trebled. The plaintiff in point of fact was given judgment for three hundred and seventy dollars; and we fail to see how, if this default and judgment had been set aside, and a trial had upon the issues tendered by the defendant's proffered pleading, he could have escaped

the liability of a judgment for a much larger sum than that actually entered against him.

All of these matters were before the court when it denied the defendant's application to be relieved of the default and judgment taken against him; and this being so, we are unable to say that the trial court abused its discretion in refusing to set aside said default and judgment.

It also appears from the record herein that immediately after the entry of the judgment by defendant an execution was issued and placed with an officer for levy, and that such officer at once went out and seized a large number of the sheep of the defendant, which he threatened to drive off and sell by virtue of such execution; and that the defendant, in present fear of losing his sheep, paid the amount of the judgment to the officer, who straightway proceeded to make return on the execution and satisfy the judgment; and that such judgment had been so satisfied when the motion to vacate the default and judgment was made. The respondent insists that these facts of themselves constitute an answer to this motion; but to this view we do not give our assent upon the authority of *Patterson v. Keeney*, 165 Cal. 465, [132 Pac. 1043.]

The order is affirmed.

Lennon, P. J., and Kerrigan, J., concurred.

[Crim. No. 317. Second Appellate District.—February 2, 1914.]

THE PEOPLE, Respondent, v. PAUL SANCHEZ, Appellant.

CRIMINAL LAW—EXAMINATION OF WITNESS—OVERRULING OBJECTION TO QUESTION—HARMLESS ERROR.—Error, if any, in overruling an objection to a question propounded by the district attorney to the prosecuting witness in a rape case, is not prejudicial, if the fact testified to by the witness in response to the question has already been proved by necessary inference from answers previously given, and is established without conflict as a fact in the case.

ID.—DEFECT IN INFORMATION—REVIEW ON APPEAL FROM ORDER REFUSING NEW TRIAL.—A defect in an information cannot be considered on an appeal from an order refusing a motion for a new trial.

APPEAL from an order of the Superior Court of Riverside County refusing a new trial. F. E. Densmore, Judge.

The facts are stated in the opinion of the court.

C. W. Benshoof, for Appellant.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

CONREY, P. J.—The defendant, having been found “guilty of assault with intent to commit the crime of rape as charged in the information,” moved the court for a new trial “on the ground that the court erred in the decision of a question of law arising during the course of the trial.” Judgment having been duly entered on the verdict, defendant appeals from the order denying said motion for a new trial. No appeal was taken from the judgment.

The reporter’s transcript shows only one objection made on behalf of defendant during the course of the trial, and we may assume that the ruling made on that objection constitutes the error to which the defendant’s counsel referred. This also appears from his brief on the appeal. By the ruling referred to the court overruled the defendant’s objection to a question propounded by the district attorney to the prosecuting witness. As the fact testified to by the witness in response to that question had already been proved by necessary inference from answers previously given, and is established without conflict as a fact in the case, the court’s ruling, even if it was wrong, could not be prejudicial error.

The suggestion in appellant’s brief, of a defect in the information, cannot be considered, since there is no appeal from the judgment. (*People v. Turner*, 39 Cal. 370; Pen. Code, secs. 1012, 1239.)

The order denying the motion for a new trial is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1417. First Appellate District.—February 3, 1914.]

JAMES J. RYAN, Appellant, v. WILEY F. CRIST et al.,
Respondents.

CRIMINAL LAW—SEARCH WARRANT—PROHIBITION AFTER EXECUTION OF WARRANT.—A writ of prohibition will not issue to restrain the execution of a search warrant where, before the issuance of the alternative writ, the search warrant has been executed and the property taken into the possession of the magistrate, and no showing is made of any further attempted judicial action on his part.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. F. H. Dunne, Judge.

The facts are stated in the opinion of the court.

A. S. Newburgh, for Appellant.

C. M. Fickert, District Attorney, and Maxwell McNutt, for Respondents.

THE COURT.—On petition for rehearing.

The petition for rehearing must be denied. The original application for the writ of prohibition avers the issuance and threatened execution of a search warrant, by which the property of the petitioner will be seized and taken into the possession of the magistrate issuing the process. The record shows that before the alternative writ was issued the search warrant had already been executed and the property taken into the possession of the magistrate. Its office was therefore fulfilled; and there was nothing for the court to prohibit unless it should appear that the magistrate was undertaking to do, or was assuming jurisdiction to do, some further act with reference to the property; but the record affirmatively and conclusively shows that there is no judicial act under the statute relating to search warrants which the magistrate is either assuming to do or can do, except the act of restoring the property to the petitioner upon his demand. He has made no such demand; but if he should do so, and the demand should be refused, it would appear upon the facts stated in the record that he has a plain, speedy, and adequate remedy in an action

to recover its possession, with damages for its unlawful detention. In the absence of any showing that the writ here sought is desired to prohibit any judicial action on the part of the magistrate except that which had been already consummated before the alternative writ was issued, the court adheres to its view that the matters presented upon this appeal are moot questions, which this court is not called upon to decide.

[Crim. No. 306. Second Appellate District.—February 4, 1914.]

THE PEOPLE, Respondent, v. WALTER DEAN, Appellant.

CRIMINAL LAW—DEPOSITION TAKEN UPON PRELIMINARY EXAMINATION—INSUFFICIENT IDENTIFICATION.—In a prosecution for homicide the deposition of a witness, taken before the magistrate upon the preliminary examination of the defendant, is not admissible, if it is without title or cause, although in his certificate the reporter certifies the same to be a "correct report of the testimony and proceedings upon the preliminary examination of the above-entitled cause."

1D.—ADMISSION OF DEPOSITION IN EVIDENCE—HARMLESS ERROR.—But the admission of such deposition in evidence was not prejudicial to the substantial rights of the defendant, where the testimony given by the witness in the deposition, while material, was merely cumulative of the testimony given by another witness, and the jury could not properly have reached a verdict other than that given, even if the deposition had been excluded.

APPEAL from a judgment of the Superior Court of Imperial County and from an order refusing a new trial. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, and George Beebe, Deputy Attorney-General, for Respondent.

Walter T. Casey, and Wm. J. Hanlon, as *Amici Curiae*.

SHAW, J.—Defendant appeals from a judgment whereby he was sentenced to life imprisonment for the murder of his wife.

The attorneys to whom his defense was intrusted not only failed to file any brief in support of the appeal, but on the day set for the hearing thereof, of which they had due notice, made no appearance in his behalf. Owing to the gravity of the offense of which defendant was convicted, the deputy attorney-general hesitated to move for a dismissal of the appeal under and pursuant to section 1253 of the Penal Code; whereupon other attorneys acting as *amici curiae*, offered to examine the record of upward of six hundred pages and assist the court by filing a brief in the case. With the aid of the brief so filed, wherein attention has been directed to what they conceive to be reversible error disclosed by the transcript, the court has examined the voluminous record presented.

Defendant and his wife were engaged in the business of conducting a restaurant in the city of Brawley, Imperial County. A woman by the name of Carrie Gunderson was in the employ of defendant as a waitress. The presence of this woman was the cause of frequent quarrels between defendant and his wife, the former insisting that the conduct of the Gunderson woman was such as to render her an unfit associate for his wife. His threats to discharge her had been met by statements from his wife that if he did so she would also leave. On the evening when the homicide was committed, defendant's wife, with his consent, accompanied the Gunderson woman and two male companions upon an automobile ride, and, as we gather from the record, remained out much longer than defendant had expected them to stay. Upon returning from the ride Miss Gunderson went to her room, adjoining that occupied by defendant and his wife, where she was joined by one of the men who had accompanied her on the auto ride. Defendant was in his room, and, immediately upon his wife entering, an altercation arose between them, during or following which three pistol shots were heard in the chamber so occupied by them. The proprietor of the hotel immediately broke open the door leading to the room, when defendant's wife was found in a dying condition with two pistol wounds upon her body; and a few minutes thereafter defendant was found about two blocks from the hotel with a bullet wound in his chest. No one other than defend-

ant and his wife was in the room at the time, and no one saw the shots fired.

Upon the theory that evidence offered was sufficient to show that Carrie Gunderson, who had testified at the preliminary hearing of defendant, could not with due diligence be found in the state (Pen. Code, secs. 686, 869), her deposition taken before the magistrate upon the preliminary examination of defendant was, over defendant's objection, read in evidence. This ruling is assigned as the chief error upon which a reversal is claimed. Waiving the question as to the alleged insufficiency of the evidence to show proper diligence in an effort to find the witness, without which the deposition was not entitled to be read, and as to the sufficiency of which we express grave doubts, the objection that the deposition had not been identified as a transcript of the evidence given by the witness before the magistrate at the preliminary examination of defendant upon being charged with the offense, and therefore incompetent, irrelevant, and immaterial, should have been sustained. The deposition as offered in evidence is without title or cause. It commences: "Carrie Clark, called by the plaintiff and duly sworn, testified as follows," followed by questions and answers. In his certificate the reporter certifies the same to be a correct report of the testimony and proceedings upon the preliminary examination of the *above entitled cause*, but inasmuch as the cause wherein the testimony was taken is not entitled, and for aught that appears in the record may have been the testimony taken in a case other than the one wherein defendant was charged with the crime for which he was being tried, such reference in the certificate is meaningless as an aid to identification of the document. In *People v. Ward*, 105 Cal. 652, [39 Pac. 33], the supreme court in discussing a like error committed by the trial court, said: "The transcript of the testimony should, moreover, be so authenticated that an inspection of it will show that it is testimony which was taken at the preliminary examination of the accused who is then on trial, and must not depend upon the memory of the magistrate or of the reporter. To allow oral proof at the trial for the purpose of showing against what defendant, or upon what charge, or at what time the testimony was taken reduces the proceeding from a record required by the statute, to the memory of the re-

porter—shadowy or clear, according to the length of intervening time or the number of examinations that he may have reported. (See *People v. Carty*, 77 Cal. 215, [19 Pac. 490].) In the present case the reference in the certificate of the reporter to the 'within entitled action' has no effect in identifying the 'copy of the testimony' with the examination of the defendant, since it appears by the bill of exceptions that the copy so certified does not contain the name of any court or cause." (See, also, *People v. Lewandowski*, 143 Cal. 579, [77 Pac. 467]; *People v. Buckley*, 143 Cal. 375, [77 Pac. 169].)

Notwithstanding the error and the fact that the evidence thus improperly admitted was material, though cumulative, we are constrained to hold, upon a careful examination of the entire record, that the defendant's substantial rights were not prejudiced by reason of the erroneous ruling. The evidence properly received clearly tended, without substantial contradiction, to show that defendant's wife was conducting herself in a manner which met with his disapproval; that she had resented any interference or efforts on his part to control her conduct; that he disliked the Gunderson woman, with whom he had on the day of the homicide quarreled and threatened to discharge her; that his wife stated, if he carried out such threat, she also would leave; that after this quarrel he and deceased went for a buggy ride, he taking with him the revolver, during which ride he discharged all the shells for same then in his possession, and on his return home about five o'clock P. M., he placed the pistol, unloaded, in a dresser drawer in the room occupied by himself and wife; that later in the evening his wife expressed a desire to accompany this Carrie Gunderson and two male companions on an auto ride, to which defendant gave his assent, but asked her not to stay long; that after the party left he went to bed but could not sleep; whereupon he got up, and having no shells with which to load his revolver, he went out and at some inconvenience procured them; that these loose shells were placed in the drawer with the unloaded pistol; that upon his wife returning to the room, and after defendant had locked the door, he and his wife engaged in an altercation, during which he was heard to say, "I am going to kill you right now," or words to that effect, immediately following which was the report of a gun in the room, followed by a woman's scream.

There was a slight interval, when two other shots were fired. Upon breaking the door open deceased was found alone with a bullet wound in her left hand and wrist and a fatal bullet wound in her back; that defendant was found about two blocks away, having in his possession the revolver, at which time he stated that he had shot his wife and himself, and to and in the presence of several other persons he made like admissions as to the shooting. The physical conditions were such as to preclude the theory that any one other than some one in the room could have shot the deceased, and no one other than defendant and his wife was in the room. In addition to all of this, it was shown that defendant had made statements indicative of threats to kill his wife, unless she changed her course of action; that after the shooting he stated that he stood for some time at what was known as Stall's Corner, with the intention of intercepting the automobile upon its return to the city and committing the act, or, as he expressed it, get the entire party in the machine; but owing to the fact that he got chilly and cold he went to a pool room, from which he witnessed the arrival of the party on its return to the city. According to defendant's story, he was in the room when his wife returned; that she stated to him upon her return that she intended to join the Gunder-son woman for the night, to which defendant objected, stating that if she did he would have the latter arrested, to which deceased replied that "you cannot do that without having me arrested"; and he said, "Very well, I will do that then"; whereupon she made reply, "Yes, if you do, you son-of-a-bitch, I will kill you." Upon which defendant says: "I started to go toward the door to go out and she thrust . . . this gun here at me (being the gun which, unloaded, he had deposited in the dresser drawer), and I grabbed at it with my left hand and it went off. I grabbed hold of it and in the struggle to get it away from her, it snapped once or twice, I don't know which, and then it went off and hit me here, and she released the gun . . . I turned to go . . . when I heard two shots fired in rapid succession, and before I could get out of the portieres there was another shot fired and I went out of the back door and I run." This evidence not only points unmistakably to the fact that defendant committed the homicide, but could leave no reasonable doubt in

the minds of an intelligent jury as to the fact that it was a deliberate and premeditated killing with malice aforethought. The evidence contained in the deposition erroneously admitted was to the effect that the witness heard defendant say, "I am going to kill you right now"; that the statement was followed by the report of a pistol in the room, followed by the scream of a woman. This was merely cumulative of the testimony given by her male companion who was present with her at the time and testified to the same facts. It is apparent that the substantial rights of defendant were not prejudiced by reason of the admission of the deposition in evidence. Had it been excluded, the jury could not properly have reached a verdict other than that given. This being true, the error should be disregarded. (Pen. Code, sec. 1404.)

The judgment and order denying defendant's motion for a new trial are affirmed.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1484. Second Appellate District.—February 5, 1914.]

**JOHN C. KEEFE, Petitioner, v. SUPERIOR COURT OF
LOS ANGELES COUNTY et al., Respondents.**

APPEAL IN JUSTICE'S COURT—UNDERTAKING—FAILURE OF SURETIES TO JUSTIFY—NEW BOND.—An appeal in a justice's court action is not perfected and will be dismissed, where the sureties on the undertaking fail to justify within five days after service of notice of exception to their sufficiency; and the furnishing by the appellant on the last day for justification of a new bond with a single corporation surety, which does not justify, in lieu of the individual sureties on the excepted undertaking, will be unavailing to save the appeal.

ID.—CORPORATION AS SURETY—NECESSITY OF JUSTIFICATION.—Corporations authorized by the provisions of section 1056 of the Code of Civil Procedure to act as sureties on undertakings in judicial proceedings, are subject to the same requirement as to justification as are persons who execute similar undertakings.

ID.—UNDERTAKING ON APPEAL—ONE OF APPELLANTS AS SURETY.—Where the defendants in an action in a justice's court are husband and

wife, and on appeal both are named as appellants in the notice and undertaking, the wife cannot act as surety, although it is asserted that she is not interested in the judgment.

PETITION for Writ of Mandate to be directed against the Superior Court of the State of California, in and for the County of Los Angeles, and Charles Wellborn, one of the Judges thereof.

The facts are stated in the opinion of the court.

Thos. C. Ridgway, for Petitioner.

Wm. Lewis, for Respondents.

JAMES, J.—This proceeding is one brought for the purpose of securing a writ of mandate to compel the superior court of Los Angeles County to vacate an order by which an appeal taken by petitioner and one other from a judgment of a justice's court was dismissed. Alternative writ was issued and the matter is presented upon the facts stated in the petition and the return as made by respondents.

It appears that an action was brought in the justice's court by one Anna B. Lister against petitioner John C. Keefe and Anna Doe Keefe, his wife; that the return of the summons showed that the true name of Anna Doe Keefe was Maria H. Keefe; that judgment was rendered in the justice's court against both defendants; that thereafter and within the time allowed by law defendants served and filed their notice of appeal and filed an undertaking on appeal, one of the sureties thereon being Maria H. Keefe. Notice was given to the plaintiff in the justice's court action of the filing of the undertaking, and exception was taken in the usual way to the sufficiency of such sureties. Notice was then given to the plaintiff that the sureties would appear and justify on a certain day, that day being the fourth day after the service of the notice excepting to their sufficiency. At the time appointed one of the sureties appeared and justified, but Maria H. Keefe did not appear, and thereupon the justice continued the hearing on the matter of the justification to the next day; that at the time to which the matter was continued the defendants in that action offered a new bond with

a single corporation surety, which bond was allowed to be filed. This surety did not then justify or offer to justify. Thereafter the plaintiff gave notice that she excepted to the sufficiency of the new surety, and also moved to strike from the files the new undertaking. The justice's court denied the motion to strike the undertaking from the files and allowed the corporation surety to justify. This statement represents the condition of facts as they were presented to the superior court on the motion to dismiss the appeal, except it may be added that the respondent in the action, in the justice's court, objected to all of the proceedings had from the time of the hearing on the justification of the first surety. By her motion to dismiss the appeal, the respondent raised the main question as to whether, upon the failure of the sureties on the undertaking on appeal to justify within five days after exception taken to their sufficiency, any jurisdiction was given to the superior court to proceed and try the case anew. • Other points were made, two of which may be mentioned, i. e., that as the original undertaking was signed by only one person competent to act as a surety, the other person being one of the appellants, a failure was shown on the part of the defendants in the justice's court action to file such an undertaking as the code requires within the time limited by section 978a of the Code of Civil Procedure; second, that the undertaking as finally filed by the corporation surety nowhere showed the names of the defendants who were appealing, and therefore was insufficient to identify any persons for whom the surety proposed to become responsible. The section just cited provides as follows: "The undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent. The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given." From the terms of the statute it seems very clear indeed that, as no justification was had of sufficient sureties on the undertaking on appeal in the justice's court, within five days after the service of

the notice of exception, the appeal was not perfected as required by law, and that, to use the language of the code, it should then be treated "as if no such undertaking had been given." The proposed appellants in the action were not relieved from securing a justification of their surety in the justice's court within the time limited merely because they had procured a corporation as surety in lieu of individuals. It has been held that corporations authorized by the provisions of section 1056 of the Code of Civil Procedure to act as sureties on undertakings in judicial proceedings are subject to the same requirement as to justification as are persons who execute similar undertakings. (*Fox v. Hale and Norcross S. M. Co.*, 97 Cal. 353, [32 Pac. 446].) The superior court, for the reasons stated, acted properly when it entered an order dismissing the appeal.

There seems also to be merit in one of the other two contentions advanced by respondents here, to wit: That the defendants in the justice's court did not file an undertaking even in form sufficient within five days after filing their notice of appeal, for the reason that only one of the sureties was competent, as the other was a defendant in the action and therefore could not in any event be considered in the light of a surety for herself. The statement by petitioner that the wife was not interested in the judgment is of no moment when it is considered that both in the notice of appeal and the undertakings filed it was noted that each of the defendants appeared as appellant. As to whether the undertaking as finally filed, and which omitted the names of the persons for whom the surety proposed to become obligated, was insufficient for that reason, need not be decided. Without expressing a final conclusion as to that matter, it may be observed that the undertaking was identified with the proceeding in which the parties litigant were ascertained, and having been voluntarily offered to be filed in that matter, it might well be held that the surety could not thereafter raise the question as to the uncertainty claimed to exist.

The application of petitioner for peremptory writ is denied.

Conrey, P. J., and Shaw, J., concurred.

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[Civ. No. 1441. Second Appellate District.—February 5, 1914.]

ANTONIO SILVEIRA COSTA, Respondent, v. DOMINGOS
SILVEIRA RAZA, Appellant.

APPEAL—ORDER REFUSING TO DISSOLVE ATTACHMENT—GROUNDS OF MOTION NOT DISCLOSED BY RECORD.—An order denying a motion to dissolve a writ of attachment will be affirmed on appeal, where the grounds upon which the motion was made are not disclosed by the record. An appellate court cannot assume error in the rulings of the trial court; error must affirmatively appear from the record, otherwise the judgment will be affirmed.

APPEAL from an order of the Superior Court of Kings County refusing to dissolve a writ of attachment. M. L. Short, Judge.

The facts are stated in the opinion of the court.

E. T. Cospers, for Appellant.

Miller & Miller, for Respondent.

SHAW, J.—Appeal from an order of court denying defendant's motion to dissolve a writ of attachment issued in the cause.

The grounds upon which the motion was made are not disclosed by the record; hence, it is impossible for the court to say the trial judge erred in making the order from which defendant appeals. The only statement in reference thereto is, "that on the 2d day of September, 1913, in pursuance of due and legal notice duly given and served upon the plaintiff's attorneys, Miller & Miller, the defendant, through his attorney, E. T. Cospers, moved the court to set aside and dissolve the levy made under and by virtue of the attachment issued out of said court in said matter." The order recites: "The motion of defendant to discharge the attachment and the motion to set aside and dissolve the levy made under and by virtue of said attachment, coming on for further hearing at this time, and said motions having been argued, . . . the court having sufficiently considered the law in the premises, orders that said motions be and the same are denied."

While the record contains certain affidavits read at the hearing of the motion, it is impossible, without knowing what the motion was, to say that the court erred in holding that the facts shown by the affidavits were insufficient to support the same. Since every intendment is in favor of the judgment of the trial court, we cannot assume error in its rulings; it must affirmatively appear from the record, otherwise the judgment will be affirmed.

The order is affirmed.

Conrey P. J., and James, J., concurred.

[Civ. No. 1325. First Appellate District.—February 6, 1914.]

ELIZABETH CONGER PRATT, a Widow, as Distributee of the Estate of **H. W. Conger, Deceased**, Appellant, v. **F. M. PHELPS et al.**, Respondents.

PROMISSORY NOTE—ACTION TO RECOVER BALANCE—CONFLICTING EVIDENCE—REVIEW ON APPEAL.—Where the evidence, in an action to recover an alleged unpaid balance on a promissory note, is conflicting, the plaintiff's evidence showing that she was in possession of the note and the defendants' testimony showing that they had paid the balance by an assignment of mining stock to the payee, a decision by the trial court in favor of the defendants will not be disturbed on appeal.

ID.—EVIDENCE—LETTER—CARBON COPY—FOUNDATION FOR ADMISSION.—In such case a ruling by the trial court, based upon one of two possible constructions of the evidence, that a letter written by the payee of the note was in reply to a letter written by one of the defendants, and therefore that an alleged carbon copy of the defendant's letter was admissible in evidence, will not be disturbed on appeal.

ID.—SECONDARY EVIDENCE—CONTENTS OF LOST LETTER.—If a letter, claimed to have been written by one of the defendants to the payee of such note, is shown to have been lost, it is proper to admit evidence of its contents.

ID.—WEIGHT OF EVIDENCE—CONSIDERATION ON APPEAL.—Primarily the weight of the evidence in every case is a matter for the consideration of the trial court, and ordinarily cannot be considered upon appeal.

APPEAL from a judgment of the Superior Court of Alameda County and from an order refusing a new trial. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

F. W. von Schrader, for Appellant.

Edward R. Eliassen, for Respondents.

LENNON, P. J.—On January 2, 1908, the defendants and respondents herein, T. M. Phelps and W. H. Collins, executed their promissory note in the sum of one thousand two hundred dollars to one H. W. Conger. On the death of Conger this action was commenced upon the note by the administrator of his estate, to recover an alleged unpaid balance of principal and interest aggregating the sum of six hundred dollars. Subsequent to the distribution of Conger's estate Elizabeth Conger Pratt, the sole distributee, was substituted as plaintiff in the action, and thereafter, upon a trial, a judgment was entered in favor of the defendants, from which and from an order denying a new trial plaintiff has appealed.

The defendants by their answer did not deny the execution of the note, but as a defense pleaded that the balance alleged to be due and unpaid thereon had been fully paid by the assignment and delivery to the deceased during his lifetime of certain shares of mining stock, which it was alleged were received and accepted by the deceased under an agreement with the defendants as payment in full of the note in suit. The plaintiff rested her case upon the proof of her possession of the note and a certified copy of a decree made in Conger's estate, distributing the note to her. The defendants produced evidence, oral and documentary, which tended to prove that, in keeping with the agreement of the parties, the note had been paid in full by the defendants' assignment and delivery to Conger and the acceptance by him of thirty thousand five hundred shares of the corporate capital stock of the Encinal Mining Company. This evidence was in a measure contradicted, but not wholly overcome, by evidence in rebuttal offered and received upon behalf of the plaintiff. The trial court made its findings of fact in keeping with the pleadings

and proof of the defendants; and it is now contended that the evidence neither warrants nor supports the findings as made.

This contention, in the presence of a substantial conflict in the evidence, cannot be considered. It would serve no useful purpose to detail the testimony received upon the trial, and then with the same detail point out the conflict existing therein. It will suffice to say generally that the testimony adduced on behalf of the defendants, if believed by the trial court, was sufficient to overcome the presumption of nonpayment resulting from the plaintiff's possession of the note; and therefore such testimony sufficiently supports the finding that the note was in fact paid in the manner and by the means pleaded in the answer of the defendants. Much, if not all, of the argument of counsel for the plaintiff upon this phase of the case is devoted to a discussion of the weight of the evidence. Primarily the weight of the evidence in every case is a matter for the consideration of the trial court, and ordinarily cannot be considered upon appeal. It may be that if the evidence of the defendants in the present case had been rejected as unworthy of credence by the trial court, the proof adduced on behalf of the plaintiff would have supported a finding in her favor. However that may be, it is apparent that the trial court gave full credence to the evidence adduced on behalf of the defendants. This it had the right to do; and having rested its decision of a question of fact upon evidence which is in substantial conflict the decision will not be disturbed upon appeal.

Complaint is made of a ruling of the trial court permitting in evidence, over the objection of the plaintiff, a carbon copy of a letter claimed to have been mailed to the deceased by the defendant Phelps. It was objected at the trial, and it is insisted here, that there was no foundation for the evidence in this, that it was not shown that the original letter had been received by the deceased and acted upon by him during his lifetime. The carbon copy of the letter in question was admitted upon condition that the foundation for its introduction in evidence would be subsequently laid. This the defendants did to the satisfaction of the trial court by introducing in evidence a letter, shown to have been written by the deceased and mailed to the defendant Phelps, which *prima facie* purported to be in reply to the original of the

carbon copy letter previously admitted in evidence. While the evidence at this point creates a doubt in our minds as to whether or not the letter from the deceased was intended as a reply to the original of the carbon copy letter, or as a reply to a previous letter from the same defendant, nevertheless the trial court resolved that question in favor of the defendants; and as the ruling was based upon one of two possible constructions of the evidence, we are neither prepared nor permitted to say that such ruling was erroneous.

There was no error in permitting the defendant Phelps to testify to the contents of a letter claimed to have been written to him by the deceased concerning the transaction in suit. The letter in question was shown to have been lost, and therefore secondary evidence of its contents was admissible. (Code Civ. Proc., sec. 1855.)

This disposes of all of the points presented in support of the appeal.

The judgment and order appealed from are affirmed.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1294. First Appellate District.—February 6, 1914.]

GEORGE E. WHITAKER, Appellant, v. T. L. MORAN
et al., Respondents.

COSTS—CONTESTING CORRECTNESS OF CHARGES—BURDEN OF PROOF.—

While it is true that the filing of a verified memorandum of costs establishes the correctness of the charges therein made which *prima facie* appear to be necessary and proper, nevertheless when the correctness of the memorandum is challenged, either in whole or in part, by the affidavit or other evidence of the contesting party, the burden is then upon the party claiming the costs to show by competent and satisfactory evidence that the items charged were for matters and things necessarily relevant and material to the issues involved in the action.

ID.—MOTION TO TAX COST OF DEPOSITION—AFFIDAVIT ATTACKING RELEVANCY AND MATERIALITY—REBUTTAL EVIDENCE.—It is improper to allow costs charged for taking depositions, where the depositions are not offered nor considered in evidence on the hearing of the

motion to tax costs, and the only showing made in opposition to the affidavit of the party attacking such items on the ground of irrelevancy and immateriality, is an unverified statement concerning the particulars of the costs charged.

ID.—DISMISSAL OF ACTION—WITNESS FEES.—As a general rule, when a plaintiff voluntarily dismisses his action, the defendant will be entitled to his necessary costs; and the mere fact that the testimony of a witness was rendered unnecessary by a dismissal of the action will not operate to deprive the defendant of the expense necessarily incurred in good faith, and within the limit of the fees prescribed by law, to secure the attendance of the witness.

ID.—COSTS OF CERTIFIED COPIES OF DOCUMENTS—ALLOWANCE ON MOTION—PRESUMPTION ON APPEAL.—The allowance by the trial court of costs for procuring certified copies of documents, on motion, where the documents are submitted to the court, will be assumed to be justified on appeal, when the documents are not set forth in the bill of exceptions, notwithstanding their validity, necessity, and materiality of the documents as evidentiary matters were controverted on the motion by affidavits of the opposing party.

APPEAL from an order of the Superior Court of the City and County of San Francisco taxing costs. W. M. Conley, Judge presiding.

The facts are stated in the opinion of the court.

Franklin P. Bull, Frank H. Short, and Everts & Ewing, for Appellant.

J. W. Henderson, James P. Montgomery, and Wm. L. Hill, for Respondents.

LENNON, P. J.—This is a direct appeal from an order taxing costs. The record does not disclose the relief sought nor the defense relied upon in the action in which the costs complained of were claimed and allowed. The appeal comes to us solely upon a bill of exceptions containing only the evidence and proceedings had and taken upon the motion to tax. The action out of which the claimed costs arose was dismissed by the trial court upon motion of the plaintiff at the close of his case. Judgment was thereupon entered for the defendants. In due time they filed their verified and itemized memorandum of costs and disbursements, which totaled the sum of \$1,027.50. Thereafter plaintiff and appellant filed a

verified motion to tax the costs claimed, by striking out certain items upon the ground that they were not properly chargeable as costs in this, that they were either excessive or not necessarily incurred and disbursed in the defense of the action. The motion to tax was noticed to be heard and determined upon the papers on file in the action, and such testimony, oral and documentary, as the parties might desire to offer. Upon the hearing the plaintiff offered in support of his motion to tax an affidavit which in detail assailed each of the items objected to, and tended to show that such items called for fees and costs in excess of the sum allowed by law, and that such fees and costs were charged not only for the attendance of witnesses whose testimony was neither necessary nor material to the defense of the action, but were also charged for the procurement of documentary evidence—deeds, records, and depositions which were wholly unnecessary to the defense of the action, and entirely irrelevant and immaterial to the issues raised by the pleadings.

In opposition to the showing made by the plaintiff the defendants filed with the court an unverified statement of the particulars concerning the charges made for the taking of certain depositions, the charges made for the making of some seventy-eight certified copies of various recorded instruments, and the charges made for certified copies of the deposition of J. A. Waltman, and a transcript of the testimony of a witness (Joe Randall) taken in the "Argentine case." Subsequently the plaintiff introduced in evidence upon the hearing of the motion an additional affidavit, tending even more strongly than the first affidavit to show that the documents, depositions and transcript referred to were unnecessary and immaterial to the defense of the action. The record shows, however, that at the time of the submission of the motion to tax, the defendants "brought into court and left with the judge thereof" the certified copies of the instruments, depositions, and testimony, last above referred to.

Upon the showing thus made the lower court entered its order, fixing as defendants' costs the following items:

"T. C. Sill, 2nd trip, seven days, W. M. C. (allowed five days) \$10;

"Certified copies deeds and records from office of county recorder of Kern County, \$58.20;

"I. L. Miller, county clerk, certified articles of incorporation, \$7.50;

"M. N. Hale, deposition, notary fee, \$7.50;

"Certified copy of J. A. Waltman deposition and testimony in Argentine case, \$28.20;

"Certified copies testimony of Joe Randall in Argentine case, \$1.50 and \$4.20;

"J. A. Waltman and M. May, depositions and notary's fees, \$23.10 and \$50.10;

"J. A. Hendricks, deposition, notary's fee and reporter, \$20.10."

All of the foregoing items were specifically challenged by the motion to tax costs and the affidavits of plaintiff upon the grounds previously stated; and it is now insisted that the allowance of these items was contrary to the evidence received and considered upon the hearing of the motion. This contention must be sustained in part. While it is true that the filing of a verified memorandum of costs establishes the correctness of the charges therein made which *prima facie* appear to be necessary and proper, nevertheless when the correctness of the memorandum is challenged, either in whole or in part, by the affidavit or other evidence of the contesting party, the burden is then upon the party claiming the costs to show by competent and satisfactory evidence that the items charged as costs were for matters and things necessarily relevant and material to the issues involved in the action. (*Barnhart v. Kron*, 88 Cal. 447, [26 Pac. 210]; *San Francisco v. Collins*, 98 Cal. 259, [33 Pac. 56]; *Müller v. Highland Ditch Co.*, 91 Cal. 103, [27 Pac. 536]; *Senior v. Anderson*, 130 Cal. 290, [62 Pac. 563]; *Fay v. Fay*, 165 Cal. 469, [132 Pac. 1040]; *Griffith v. Montandon*, 4 Idaho, 75, [35 Pac. 704].) This the defendants in the present case did not do in so far as the motion to tax concerned the costs charged for taking the depositions of J. M. Waltman, M. May, and J. A. Hendricks. These depositions were not offered nor considered in evidence upon the hearing of the motion. The defendants' unverified statement of the particulars concerning the costs charged for making certified copies of various instruments, etc., was at its best nothing more than an itemized amendment of the defendants' memorandum of costs, and cannot be construed and considered as evidence in rebuttal of the showing made by the

affidavits of plaintiff. This being so, the affidavits of the plaintiff that the depositions just referred to were neither necessary to the defense of the action nor material to the issues raised by the pleadings, stand uncontradicted. It follows, in keeping with the rule above stated, that the costs charged for such depositions should not have been allowed.

This objection, however, does not apply to the remaining items of defendants' costs. Upon its face the item of ten dollars allowed for five days' attendance of the witness Sill was proper. The proof proffered upon the part of the plaintiff did not controvert the fact that this witness was subpoenaed for the defense, and had been in actual attendance upon the trial for the number of days specified in the memorandum of costs. Nor was it attempted to be shown that he was not a necessary and material witness for the defense. As a general rule, when a plaintiff voluntarily dismisses his action the defendant will be entitled to his necessary costs; and the mere fact that the testimony of a witness was rendered unnecessary by a dismissal of the action will not operate to deprive the defendant of the expense necessarily incurred in good faith, and within the limit of the fees prescribed by law, to secure the attendance of the witness (*Randall v. Falkner*, 41 Cal. 242).

The entire evidence adduced upon the motion to tax justifies the allowance made by the lower court of the charges for certified copies of deeds, records, and articles of incorporation, and also the charges made for the certified copies of the deposition of J. A. Waltman and the testimony of Joe Randall taken in the "Argentine" case. This is so because the record shows that certified copies of these several instruments and documents were submitted to the court upon the hearing of the motion; and as they are not set forth in the bill of exceptions it will be assumed that their contents justified the finding of the lower court, notwithstanding the fact that their validity, necessity, and materiality as evidentiary matters were controverted by the affidavits of the plaintiff. (*Fay v. Fay*, 165 Cal. 469, [132 Pac. 1040].)

For the reasons stated the order appealed from is modified by striking therefrom the following items of costs: "M. N. Hale, deposition, notary's fee, \$7.50; J. M. Waltman and M. May, depositions and notary's fees, \$23.10 and \$50.10; J. A.

Hendricks, deposition, notary's fee and reporter, \$20.10." As modified the order appealed from is affirmed, appellant to recover his costs of this appeal.

Richards, J., and Kerrigan, J., concurred.

[Civ. No. 1393. Second Appellate District.—February 6, 1914.]

JANE LOUISE HENNE et al., Respondents, v. EMMA A. SUMMERS, Appellant.

LANDLORD AND TENANT—CHANGE OF ORIGINAL CONTRACT—ASSIGNMENT OR SUBLETTING—RELEASE OF SURETY OF TENANT.—Where lessees form a corporation, and the corporation occupies the leased premises and pays rent without obtaining an assignment of the lease, and, financial difficulties overtaking the corporation, the premises are occupied successively by the sheriff, a trustee in bankruptcy, and a purchaser at the trustee's sale, each paying rent on account of the lease, the sureties of the lessee are not thereby released from liability on the theory that the lessor has allowed an assignment or subletting without their consent.

ID.—WRITTEN LEASE—HOW MAY BE ALTERED.—The lease, being a written contract, could be altered only by a contract in writing or an executed oral agreement.

ID.—RENT—ACCEPTANCE FROM PERSON IN POSSESSION—RELEASE OF LESSEE AND SURETIES.—The mere acceptance by the landlord of rent from the various persons in possession did not release the lessees from the covenants contained in the lease nor discharge their sureties.

ID.—FEES OF ATTORNEY—RECOVERY IN ACTION AGAINST SURETIES.—Attorney's fees incurred by the lessor on account of the lessees' non-payment of rent and the various changes in occupancy, may be recovered by the landlord, in his action against the sureties of the lessees, without proving that such fees have actually been paid.

APPEAL from a judgment of the Superior Court of Los Angeles County. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

Jones & Weller, for Appellant.

Campbell & Moore, for Respondents.

CONREY, P. J.—In this action the defendant is sued upon a bond signed by her as surety for Edward Booth and John W. Neighbours, to secure the performance of certain obligations of a lease made to said principals by the plaintiffs' predecessor in interest. The same instruments were construed by this court as to some of their terms in *Henne v. Summers*, 16 Cal. App. 67, [116 Pac. 86], but the testimony considered in that decision is not before the court on the record in this case. The bond was conditioned upon terms that were "to secure the full performance of all the obligations contained in said lease above referred to, and also the last two months' rent" specified in the lease. The judgment herein is for the sum of nine hundred dollars. The findings show that six hundred and fifty dollars of this amount was to satisfy a balance due on the last month's rent and that the remaining two hundred and fifty dollars was allowed on account of attorney's fees incurred in connection with defaults which took place and which required the rendition of various services to protect the rights of plaintiffs with respect to said lease. Defendant appeals from the judgment.

The lessees incorporated their business and the corporation occupied the leased premises and paid rent without having obtained an assignment of the lease. The corporation's stock of merchandise in the leased storeroom was attached and bankruptcy proceedings followed. Within five months after the attachment the premises were successively occupied by the sheriff, by a trustee in bankruptcy, and by the purchaser at trustee's sale of the stock. Each of these paid rent on account of the lease. Then, after notice to the original lessees and to the defendant and certain other persons, the plaintiff, Mrs. Henne (at that time acting as executrix of the will of the original lessor) relet the premises and kept them leased from time to time, but was unable to obtain the full rental value provided in the Booth and Neighbours lease. The plaintiffs, and their predecessors as lessors did not enter into any contract changing the Booth and Neighbours lease or for sub-leases prior to the notice given under the circumstances above noted.

1. Defendant claims that she is released from liability because the lessor had allowed an assignment or sub-letting of the premises without defendant's consent, and because the

leased premises were surrendered to the landlord before service of the above mentioned notice. This contention is not well founded. The contract of lease being in writing could only be altered by a contract in writing or an executed oral agreement. Nothing of the kind is shown here; nor is it shown that the lessor released the first lessees from any of the covenants contained in the lease. The mere accepting rent from one in possession under the lease would not have that effect. (*Brosnan v. Kramer*, 135 Cal. 36, [66 Pac. 979].)

2. The expenses incurred for service of attorneys were caused by the nonpayment of rents and by the various changes in occupancy which took place without the consent or fault of the lessor. They were expenses incidental to default by the lessees not only in payment of rent, but in occupancy and care of the leased premises. It was not necessary to prove that these expenses have been actually paid. (*Donnelly v. Hufschmidt*, 79 Cal. 74, [21 Pac. 546].)

3. The defendant has suffered no harm by the failure of the court to rule upon her motion to strike out certain testimony with reference to services performed in regard to this lease up to and including the lease which was made after notice to defendant. The evidence shows without conflict that services of the same kind rendered later than that time were worth two hundred and fifty dollars, and the damages allowed on that item of the claim of plaintiffs were only two hundred and fifty dollars.

The judgment is affirmed.

James, J., and Shaw, J., concurred.

[Civ. No. 1312. First Appellate District.—February 6, 1914.]

CHARLES FEY, doing business as **CHARLES FEY & COMPANY**, Respondent, v. **ROSSI IMPROVEMENT COMPANY, Inc.**, Appellant.

LANDLORD AND TENANT—LEASE OF PREMISES ON WHICH TO MANUFACTURE NICKEL AND SLOT MACHINES—LAWFULNESS OF ENTERPRISE—CANCELLATION OF LEASE.—A complaint in an action by a lessee for the cancellation of the lease, which alleges that the premises were leased for the purpose of conducting therein the business of manufacturing "coin operating machines, commonly known as nickel-in-the-slot machines," and that by an act of the legislature in the year 1911, the business of manufacturing or having in possession any nickel-in-the-slot machine became unlawful, fails to state a cause of action upon the theory that the subsequently enacted law rendered the terms of the lease impossible of performance.

ID.—NICKEL-IN-SLOT MACHINES—CONSTRUCTION OF SECTION 330a OF PENAL CODE.—Section 330a of the Penal Code, enacted in 1911, does not prohibit or penalize the manufacture of nickel-in-the-slot machines, but has reference only to such machines when they are intended for gambling purposes, "upon the result of action of which money or other valuable thing is staked or hazarded."

ID.—WORDS AND PHRASES—MEANING OF NICKEL-IN-THE-SLOT MACHINES.—The phrase "nickel-in-the-slot machine" ordinarily has reference only to that "numerous class of catch-penny contrivances" which, when a nickel or other small coin is dropped into the slot, will return something of value without any element of chance other than that usually present in ordinary transactions of barter and trade.

ID.—PLEADING—DEMURRER—ADMISSION OF ALLEGATIONS OF COMPLAINT.—The general rule of pleading, which admits as true upon demurrer all matters of fact averred in a complaint, has no application to facts of which a court may take judicial notice; and a demurrer never admits the conclusion of law to be deduced from those facts.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. John L. Childs, Judge presiding.

The facts are stated in the opinion of the court.

Thomas H. Breeze, for Appellant.

Wm. Tomsy, for Respondent.

LENNON, P. J.—This is an appeal from a judgment upon the judgment-roll alone in an action instituted primarily for the purpose of procuring the cancellation of a written lease of certain premises, executed to the plaintiff by the defendant. Judgment was rendered and entered for the plaintiff. The sufficiency of the facts stated in the plaintiff's complaint to constitute a cause of action as against demurrer is the only question presented for decision.

Plaintiff's complaint, after pleading the execution of the lease, alleged "that in accordance with the conditions of said lease the said premises were leased by plaintiff from defendant for the purpose of conducting therein a business of manufacturing of coin operating machines, commonly known as nickel-in-the-slot machine, and for no other purpose.

"That in accordance with said lease plaintiff has complied with all of the terms of said lease up to the time of the commencement of this action.

"That by an act of the legislature of the state of California in the year 1911, the business of manufacturing or having in possession any nickel-in-the-slot machine became unlawful, and by reason thereof the plaintiff was compelled to abandon said business, and that by virtue of the said contract of lease the plaintiff cannot use the said premises for any other purpose, and that unless by an adjudication of this honorable court, said defendant will compel plaintiff to continue carrying out the provisions of said lease.

"That after the enactment of said law and prior to the commencement of this action plaintiff tendered said premises to defendant and offered to cancel said lease, but the defendant has failed, neglected and refused same to do."

The defendant's demurrer should have been sustained. The facts above stated do not constitute a cause of action for the cancellation of the lease in question. The statute relied upon by the plaintiff is imperfectly pleaded; but a resort to the statutes of 1911, which by a general reference are made a part of plaintiff's complaint, reveals but one enactment of the legislature at all applicable to the plaintiff's cause of action, and that is entitled, "An Act to add a new section to the Penal Code of the state of California, to be numbered section 330a, relating to gambling by the use of slot machines etc." (Stats. 1911, chap. 483, p. 951.) The text of that act in its

essential features is as follows: "Every person who has in his possession or under his control . . . or who permits to be placed, maintained or kept in any room . . . owned, leased or occupied by him . . . any slot or card machine, contrivance, appliance or mechanical device upon the result of action of which money or other valuable thing is staked or hazarded by placing or depositing therein any coins . . . or as a result of the operation of which any merchandise, money, representative or articles of value . . . is won or lost . . . when the result of action or operation of such machine . . . is dependent upon hazard or chance, . . . is guilty of a misdemeanor."

As we read and construe this new section of the Penal Code, the manufacture of nickel-in-the-slot machines is neither prohibited nor penalized. True, a person could not manufacture a "slot machine" without having the completed machine in his possession for a time at least; but the title and text of the statute clearly indicate that the possession referred to therein shall be of slot machines intended for gambling purposes, "upon the result of action of which money or other valuable thing is staked or hazarded." The complaint in the present case does not allege that the demised premises were leased for the purpose of manufacturing any of the gambling devices designated in the statute. The allegation of the complaint in this behalf is merely that the premises were leased for the purpose of conducting therein the business of manufacturing "coin operating machines commonly known as nickel-in-the-slot machines. . . ." It is a matter of common knowledge that coin operated slot machines are manufactured, and generally used by small tradesmen, places of amusement, and public service corporations, upon the result of the action of which money or other thing of value is not hazarded, among which, for instance, may be noted the coin operated slot machines attached to talking machines, music boxes and auto-pianos; those which vend small articles of merchandise such as candy, cigars, stamps, etc., and those which control gas and telephone service. In keeping with this common knowledge a slot machine has been authoritatively defined as "a vending machine or the like, having a slot in which a coin may be dropped to cause the delivery of merchandise, or to permit the use of a telephone, or for some like purpose." (Webster's Dictionary.) And by the same authority, when such

a machine is adjusted so that it may be operated by the deposit of a five-cent piece, it is defined to be "a nickel-in-the-slot" machine. It may therefore be said with certainty that the phrase "nickle-in-the-slot machine" ordinarily has reference only to that "numerous class of catch-penny contrivances" which, when a nickel or other small coin is dropped into the slot, will return something of value without any element of chance other than that usually present in ordinary transactions of barter and trade (*State v. Vasquez*, 49 Fla. 126, [38 South. 830].) Obviously a criminal complaint, charging a person merely with having in his possession "a coin operating machine commonly known as a nickel-in-the-slot machine," would not, when measured by the commonly known definition of "a nickel-in-the-slot machine," survive the test of a demurrer grounded upon insufficiency of the facts stated to constitute an offense within the meaning of section 330a of the Penal Code. This being so, it follows that the allegations of the plaintiff's complaint in the present case, that the demised premises were leased to him solely for the purpose of conducting therein "the business of manufacturing coin operating machines commonly known as nickel-in-the-slot machines," cannot be construed to mean that the terms of the lease restricted the use of the premises to the manufacture of the particular and peculiar kind of "slot machine" denounced by the statute. In short, the statute under discussion relates only to gambling machines, and does not purport to make the business of manufacturing "coin operating machines commonly known as nickel-in-the-slot machines" unlawful. It must be held, therefore, that the plaintiff's complaint does not sufficiently state a cause of action for cancellation of the lease in question upon the theory that the subsequently enacted law rendered the terms of the lease impossible of performance.

Counsel for the plaintiff refuses to discuss the scope and effect of the statute pleaded as an essential element of the plaintiff's cause of action; but in support of the judgment invokes the general rule of pleading which requires, for the purposes of a decision upon demurrer, that the allegations of a complaint must be taken to be true. With this general rule as a basis it is contended that the enactment, scope, and effect of the statute relied upon must be accepted as pleaded. The

absurdities which would be certain to result from such a construction of the rule in question are too obvious to require illustration here; and it will suffice to say in response to plaintiff's contention that the general rule of pleading, which admits as true upon demurrer all matters of fact averred in a complaint, has no application to facts of which a court may take judicial notice; and that a demurrer never admits the conclusion of law to be deduced from those facts (*French v. Senate*, 146 Cal. 604, [2 Ann. Cas. 756, 69 L. R. A. 556, 80 Pac. 1031]; *First Nat. Bank etc. v. Lewinson*, 12 N. M. 147, [76 Pac. 288]; *Hester v. Thomson*, 35 Wash. 119, [76 Pac. 734]; *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, [95 Pac. 89]).

The judgment is reversed, with directions to the lower court to sustain the defendant's demurrer.

Richards, J., and Kerrigan, J., concurred.

[Crim. No. 470. First Appellate District.—February 6, 1914.]

THE PEOPLE, Respondent, v. JAMES E. HUNT,
Appellant.

CRIMINAL LAW—FORGERY OF CHECK—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.—In this prosecution for the forgery of a check, it cannot be said that there is no evidence of knowledge on the part of the defendant of the spurious character of the check. The identity of denomination of the money found on his person with that by which the check was paid on the previous day is highly significant, and goes far to corroborate the testimony of the paying teller that the defendant is the man to whom he paid the money. And the defendant's denial of having money on his person, except a few cents, is also not without significance.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco and from an order refusing a new trial. J. J. Trabucco, Judge presiding.

The facts are stated in the opinion of the court.

J. C. Murray, and H. H. McPike, for Appellant.

U. S. Webb, Attorney-General, and J. H. Riordan, Deputy Attorney-General, for Respondent.

KERRIGAN, J.—The defendant was charged by information with the crime of forgery. He was tried and convicted. This appeal is from the judgment and from an order denying his motion for a new trial.

The defendant contends that the evidence is insufficient to support the verdict. This contention is based on the theory that while the evidence may be sufficient to show that the check described in the information was forged, it does not sustain the finding of the jury that it was uttered by the defendant with knowledge that it was forged.

The check was for the sum of fifty dollars, and was made payable to "Cash." It purported to have been made by one E. R. Hayden, but the signature was forged. When the check was presented to the paying teller of the bank on which it was drawn, it being what is known as a "cash check," it was promptly paid without the requirement of identification, notwithstanding that the person presenting it was a stranger to the teller. There was, however, something about the transaction that aroused a slight suspicion in the mind of this official concerning the regularity of the matter, so that when a little later in the afternoon E. R. Hayden came into the bank, he called Hayden's attention to the check, who at once characterized the paper as a forgery. The description of the man who cashed the check, given by the paying teller, fitted in a general way the defendant, who had desk room in Hayden's office. Hayden immediately went to his office; and on examining his desk found that several blank checks had been extracted therefrom, one of which bore the number of the check here involved. The next day, on being requested by Hayden for a small loan, defendant said that he had but a few cents on his person; but on being searched by the detective who was within call, it was disclosed that he had two twenty dollar pieces, a five dollar piece and three dollars in silver coin. The check had been paid by the teller of the bank with two twenty dollar pieces, one five dollar piece, four silver dollars and two half dollars; so that the amount of money thus found on the defendant was made up of coins of exactly the same denomination (allowance being made for the difference of two dollars in the amount) as the sum paid by the bank teller on the forged check on the previous day. The paying teller identified the defendant as the person who cashed the check. The

evidence further showed that the defendant was in straitened circumstances, being behind with his rent to Mr. Hayden and his telephone bill, which he had not paid, notwithstanding a demand therefor.

We think that the appellant's contention that the evidence is insufficient to sustain the verdict, in that there is no evidence of knowledge on the part of the defendant of the spurious character of the check, cannot be sustained. We are free to say that the case against him is by no means strong; but we cannot hold that it is insufficient to support the verdict. We think the identity of denomination of the money found on the person of the defendant with that by which the check was paid on the previous day is highly significant, and went far to corroborate the testimony of the paying teller that the defendant was the man to whom he had paid the money. The assertion may be ventured that if the amount of money on each of ten thousand persons taken at random were examined, probably not one would be found having upon his person the sum found upon the defendant, made up of coins of given denominations, unless a few hours previously such person had received approximately the same amount of money composed of coins of those given denominations. The defendant's denial of having money on his person except a few cents may also be regarded as not without significance; for a person who has obtained property illegally is quite likely to wish to conceal it, even though the nature of the property be such as not to afford very conclusive evidence of guilt. These circumstances no doubt went far toward satisfying the jury that the paying teller's testimony was true. Being satisfied on this point, they no doubt regarded the defendant's denial of cashing the check as false, and in itself indicative of guilty knowledge on his part of the spurious character of the check.

The contention is also made by the appellant that the court was in error in refusing, as it is claimed, to hear argument by his counsel as to the insufficiency of the evidence on the motion for new trial; and also erred to the prejudice of the defendant in not granting his motion for a new trial on the ground of newly discovered evidence. We have examined both these points, and find no occasion for discussing them, as they are without substantial merit.

The judgment and order are affirmed.

Lennon, P. J., and Richards, J., concurred.

[Civ. No. 1476. Second Appellate District.—February 7, 1914.]

F. M. SAYRE, Respondent, v. SAN PEDRO, LOS ANGELES
& SALT LAKE RAILROAD COMPANY (a Corpora-
tion), Appellant.

**ACTION FOR NEGLIGENCE—ALLEGATION OF CONTRIBUTORY NEGLIGENCE—
FINDINGS THAT ALLEGATIONS ARE TRUE—JUDGMENT FOR DEFEND-
ANT.**—Where, in an action against a railroad company for damages
on account of a collision of a freight car with the plaintiff's auto-
mobile, the defendant alleges that the injuries sustained by the plain-
tiff were due to his own negligence, and it is found "that all of the
affirmative allegations of the defendant's answer are true," and
"that paragraphs 1, 2, 3, 4 and 5" (presumably of the complaint)
are true, the defendant is entitled to judgment on the findings.

APPEAL from a judgment of the Superior Court of Los
Angeles County. Gavin W. Craig, Judge.

The facts are stated in the opinion of the court.

A. S. Halsted, and W. F. Palmer, for Appellant.

W. H. Stevens, and Chas. S. McKelvey, for Respondent.

SHAW, J.—Action for damages alleged to have been sus-
tained by plaintiff on account of the negligent operation of
a freight car over defendant's railway track, as a result of
which it collided with an automobile valued at five thousand
dollars, driven by plaintiff, demolishing the same and injuring
plaintiff to his damage in the sum of ten thousand dollars.
The court gave judgment for plaintiff in the sum of one
thousand dollars, from which defendant appeals.

In addition to specific denials of the allegations of the com-
plaint, defendant, as a separate defense and by affirmative
allegations, alleged that the damage sustained by plaintiff
was due to his own negligence, alleged to be the proximate
cause of the injury.

The court found "that paragraphs 1, 2, 3, 4 and 5 are
true"; but since both the complaint and answer contain para-
graphs so numbered, it is impossible to determine from the
finding whether it refers to the complaint or answer. Con-

ceding that in support of the judgment we might indulge the presumption that the finding has reference to the complaint, such fact cannot aid the respondent, for the reason that the court specifically found "that all of the affirmative allegations of the defendant's answer are true." It thus clearly and unequivocally appears from the finding that the damage found to have been sustained by the plaintiff was caused by his own negligence as alleged in the answer.

Not only are the findings insufficient to support the judgment, but it is apparent therefrom that defendant is entitled to judgment thereon.

It is, therefore, ordered that the judgment be reversed and the trial court directed, upon the going down of the *remittitur*, to enter judgment upon the findings in favor of defendant.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1472. Second Appellate District.—February 9, 1914.]

J. H. STRAIT, Appellant, v. MARY WILKINS et al.,
Respondents.

CONTRACT TO EXCHANGE LANDS—DAMAGES FOR BREACH—WHEN NOT RECOVERABLE.—Damages for the breach of a contract to exchange lands are not recoverable in an action wherein it appears from the evidence that the relative values of the properties are such that the plaintiff suffered no damage from the refusal of the defendant to carry out the agreement and make the exchange.

ID.—NOMINAL DAMAGES—JUDGMENT FOR REFUSED.—In such action a judgment for nominal damages, which will carry costs, will be denied, under the rule that a judgment for such damages is justified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might else be lost by acquiescence and lapse of time.

ID.—AMENDMENT OF ANSWER BY STRIKING OUT PARAGRAPH—DISCRETION IN PERMITTING.—The court does not err in such action in permitting the defendants to amend their answer by striking out a certain paragraph thereof, especially if it allows a continuance of one week on account of the amendment.

ID.—MARKET VALUE OF LAND—EVIDENCE—TIME OF VALUATION.—In admitting evidence in such action of the market value of properties

the court is required, in the exercise of a sound discretion, to limit the proof to a period reasonably proximate to that of the date of the alleged breach of the contract.

APPEAL from a judgment of the Superior Court of Los Angeles County and from an order refusing a new trial. Eugene P. McDaniel, Judge presiding.

The facts are stated in the opinion of the court.

Eugene C. Campbell, for Appellant.

John E. Daly, for Respondents.

JAMES, J.—This action was prosecuted for the purpose of securing damages alleged to have been suffered by the plaintiff through the failure of defendants to convey certain real property. Judgment was in favor of the defendants, and a motion for a new trial having been made, this appeal was taken from the judgment and from the order denying the motion.

On the nineteenth day of June, 1907, plaintiff and defendant Mary A. Wilkins entered into a contract, which was expressed in writing, whereby an exchange of properties was agreed to be made. In that agreement it was recited that the property of plaintiff was valued at six thousand five hundred dollars, and the property of said defendant at ten thousand five hundred dollars. The property of plaintiff was subject to a mortgage lien of three thousand dollars. In order to equalize the values it was agreed that plaintiff should pay five hundred dollars in cash and give back a mortgage on the property which he was to secure from said defendant in the sum of six thousand five hundred dollars, and that plaintiff's property should be received by the said defendant subject to the said mortgage of three thousand dollars. Defendant Mary A. Wilkins refused to carry out the agreement, and it was alleged by plaintiff that he thereafter sold his property by exchanging the same for an orange ranch and that he received in exchange the highest market price obtainable, which he alleged to have been the equivalent of five thousand dollars had the consideration received been represented by cash. He alleged that the property of the defendant Mary A. Wilkins had, at all times material to the contro-

versy, a market value of more than twelve thousand dollars. He further alleged that defendant Thomas Wilkins was the husband of defendant Mary A. Wilkins, and that in fact the property considered in the contract mentioned to be that of the said Mary A. Wilkins, was the property of Thomas Wilkins, and that the wife was acting, when she entered into the agreement referred to, as the undisclosed agent of her husband. The defendants answering, admitted the execution of the contract as alleged in plaintiff's complaint and admitted the breach thereof, and took issue as to the respective values which the plaintiff in his allegations had assigned to the several properties. Other denials were made which presented issues not necessary to be considered, in view of the conclusions which have been arrived at upon the matters already suggested. The court found upon sufficient evidence that the value of plaintiff's property at the time of the alleged breach of contract was the sum of six thousand dollars, and that the value of the property of defendants on the same date was eight thousand dollars. As plaintiff was to pay five hundred dollars in cash and give back a mortgage against the property secured from defendants for the sum of six thousand five hundred dollars, and a mortgage of three thousand dollars was to remain and be assumed by defendant Mary A. Wilkins against the property of plaintiff, in determining as to whether any damage had been suffered, there should be added to the value of six thousand dollars, as found by the court to be that of plaintiff's property, the sum of five hundred dollars and the difference between three thousand dollars and six thousand five hundred dollars, which total would more than equal the sum of eight thousand dollars found to have been the market value of defendants' property. Upon this calculation, and as based upon the facts found, the court was correct in concluding that plaintiff had not suffered damage. This conclusion renders it wholly immaterial as to whether or not the finding made by the trial judge that plaintiff was in no wise deceived by any act or omission on the part of defendant Thomas Wilkins as to the latter's interest in the property, was justified by the evidence. It may be said that that finding does not appear to be sustained by the proof made.

It appears that upon motion for a new trial being made, the court required of the defendants a waiver on their part as to costs awarded to them as a condition to a denial of the

motion. The judgment as it remained then was in favor of the defendants, but did not allow costs to either party. It is plaintiff's contention that, in view of the fact that it was shown that defendant Mary A. Wilkins, without cause, refused to comply with the conditions of her contract, a judgment for nominal damages (which it is admitted would not carry costs) should have been entered. In the case of *Stewart v. Sefton*, 108 Cal. 197, [42 Pac. 293], it is said: "But a judgment for such damages (meaning nominal) is justified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might else be lost by acquiescence and lapse of time." It is not made to appear in this cause that a judgment for nominal damages, under the facts shown and the decision cited, should have been entered.

The trial court did not err in permitting the defendants to amend their answer by striking out a certain paragraph thereof. The allowance of the amendment was within the discretion of the trial court, which discretion is not shown to have been abused, especially as it appears that the court allowed a continuance of the trial on account of such amendment having been made of more than a week. The alleged errors complained of with reference to the refusal to allow testimony as to the value of the Wilkins property at a date subsequent to that of the alleged breach of contract, and the refusal to allow a question to be answered as asked of defendant Mary A. Wilkins as to what was paid for the defendants' property a number of months prior to the date of the alleged breach, have no meritorious foundation. In admitting proof as to the market value of the property the court was required, in the exercise of a sound discretion, to limit the proof to a period reasonably proximate to that of the date of the alleged breach, and the rulings excluding evidence which had reference to times remote from the date most material, were properly made. (*Montgomery v. Sayre*, 100 Cal. 182, [38 Am. St. Rep. 271, 34 Pac. 646].)

The attention of the court is not called to any error which, considered in the light of the facts conclusively determined by the trial judge to exist, could operate to the prejudice of plaintiff.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

[Civ. No. 1194. Third Appellate District.—February 12, 1914.]

**GOLDEN & COMPANY (a Corporation), Petitioner, v. THE
JUSTICE'S COURT OF WOODLAND TOWNSHIP
et al., Respondents.**

**INTOXICATING LIQUORS—POWER OF MUNICIPALITY TO PROHIBIT SALE—
SOLICITATION OF ORDERS—PLACE OF DELIVERY.**—The legislative authority of a municipality or political subdivision of the state cannot enforce penalties against persons soliciting orders within its jurisdiction for intoxicating liquors, in cases where such liquors are to be delivered outside the limits of such subdivision.

ID.—WYLLIE LOCAL OPTION LAW—SOLICITATION OF ORDERS—PLACE OF SALE OR DELIVERY.—Section 15 of the Wyllie Local Option Law (Stats. 1911, p. 599), which makes it unlawful for any persons "within no-license territory to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors," cannot be invoked by a municipality to prohibit the solicitation or taking of orders within its limits for the sale or delivery of such liquors without its boundaries.

ID.—SALE OF LIQUOR—COMPLAINT CHARGING—JURISDICTION OF JUSTICE'S COURT.—A complaint which, in the language of the statute, charges the solicitation of orders for the sale of intoxicating liquors within "no-license territory," is sufficient to give a justice's court, acting as a magistrate's court, authority to preliminarily examine and pass upon the charge, although it does not directly appear from or upon the face of the complaint whether the liquor was to be delivered within or without the territory.

ID.—ORDER FOR SALE OF LIQUOR—MANNER OF TAKING.—Section 15 of the Wyllie Act, which makes it unlawful for any person, company, association, or club, within no-license territory, to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors, does not contemplate that the prohibited solicitation must be carried on within such territory in person by a party or his agent. Such section was intended by the legislature to prevent, if possible, or to penalize, if committed, the solicitation of orders, the taking of orders or the making of agreements within no-license territory for the sale or delivery of intoxicating liquors in such territory, irrespective of the manner in which such acts might be accomplished.

ID.—PERSONAL SOLICITATION OF ORDERS UNNECESSARY—TAKING OF ORDERS BY MAIL.—One who solicits orders or makes agreements through the instrumentality of letters, sent to the addresses in no-license territory of persons residing or being therein, thus brings

himself as clearly under the ban of the statute as if he were to prosecute such solicitation or make such agreements in person within the boundaries of such territory.

ID.—INTERPRETATION OF STATUTE—PURPOSE OR OBJECT OF ACT.—Every statute must be construed with reference to the object intended to be accomplished by it; and in order to ascertain this object, it is proper to consider the occasion and necessity of its enactment.

ID.—GRAMMATICAL CONSTRUCTION OF STATUTE—WHEN MAY BE REJECTED.—Where a statute may be given a grammatical construction leading to a result in manifest opposition to its purpose and intent, or in circumvention of its paramount object, such construction will be rejected and one adopted which will effectuate or carry out the object designed by the legislature to be accomplished by the act.

ID.—LIQUOR FOR HOUSEHOLD USE—SOLICITING ORDERS FOR PROHIBITED.—The act of soliciting orders from individuals for household purposes was intended to be and is enjoined by the Wyllie Act.

ID.—SALE OF LIQUOR—PLACE OF CONSUMMATION.—Under such act it is not important, so far as concerns either the act of soliciting orders or that of making agreements for the sale or delivery of intoxicants, whether the sale contemplated by such solicitation or agreements is consummated outside of the territory, for the gist or gravamen of the offense of soliciting orders or that of making agreements for intoxicants within such territory is in the solicitation or the making of the agreements with the purpose and intent of delivering such liquors therein.

ID.—MANNER OF TAKING ORDERS FOR LIQUOR—SCOPE OF WYLLIE ACT.—The Wyllie Act is intended to prevent every kind and character of solicitation, whatever may be its form, whether in person or by letter or other like communications sent either from without or from within no-license territory through the United States mail or by messengers and addressed to persons within such territory, except pharmacists, at their residences or places of business.

ID.—DISTINCTION BETWEEN SOLICITING ORDERS BY LETTER AND BY NEWSPAPER ADVERTISEMENT.—There is a distinction between the solicitation of orders by means of letters or circulars sent through the mail to particular individuals in no-license territory, and the circulation in such territory of newspapers containing advertisements extolling the quality and giving the price of certain brands of liquor. In the first case the minds of particular persons are directly addressed upon a single subject and their attention thus specially called to the subject matter of the letter or circular, while in the other no particular person is appealed to upon any one of the various matters which are usually referred to in or given publicity through the medium of the advertising columns of a newspaper of general circulation.

ID.—WORDS AND PHRASES—MEANING OF WORD “SOLICIT.”—The word “solicit” implies personal petition and importunity addressed to a particular individual to do some particular thing, and it is unquestionably in this sense that the term is used in the Wyllie Act.

ID.—SOLICITING ORDERS FOR LIQUOR BY MAIL—VENUE OF OFFENSE.—The solicitation of orders for liquor by mail in no-license territory is complete upon the receipt of the letter by the person to whom it is addressed, and the venue of the offense is in that county.

APPLICATION for Writ of Prohibition to be directed against the Justice’s Court of Woodland Township, County of Yolo, and J. E. Strong, Justice of said court.

The facts are stated in the opinion of the court.

Hoefer & Morris, and Rothchild, Golden & Rothchild, for Petitioner.

I. M. Golden, and J. A. Pritchard, *Amici Curiae*.

HART, J.—This is a petition for a writ of prohibition to restrain the above named respondents from “taking any further proceedings pending in the case of the People of the State of California, Plaintiff, v. Golden & Company, a corporation, in said justice’s court, and from hearing, determining, passing upon, trying or deciding any proceeding in said case,” etc. etc.

This proceeding arises by reason of the filing of a complaint, on the twenty-first day of June, 1913, in the respondent court, by the district attorney of Yolo County, charging the petitioner with the violation of section 15 of the Local Option Law, popularly known as the “Wyllie law,” and passed by the legislature of 1911. (Stats. 1911, p. 599, et seq.) The specific charge against the petitioner is that it solicited the sale of certain alcoholic liquors within the limits of the city of Woodland, a municipal corporation, it being admitted by the petitioner, for the purposes of this case, that, prior to the time at which the petitioner is alleged to have committed the offense with which it is charged in the complaint objected to here, at an election, held in said city, in pursuance of the provisions of said local option law, the electors voted in favor of the application of the provisions of said law to the territory embraced within the corporate limits of said city and thus de-

clared that said municipality should thereafter be no-license territory.

From the petition in this proceeding it appears that the petitioner "is and was at all the times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the state of California; that its principal place of business is in the city and county of San Francisco, in said state of California, and is and at all times herein mentioned was lawfully engaged in the business of selling, furnishing and distributing alcoholic liquors." It is further alleged that said petitioner was not at any of the times mentioned in the complaint filed against it "a person, company, association or club being or existing within the limits of the county of Yolo"; that it has no place of business within the limits of the said county of Yolo, but, "as said complaint shows upon its face, has its principal place of business in the city and county of San Francisco," etc.; that, "as appears upon the face of the said complaint the said alleged violation of the said act consisted solely of the mailing of certain letters, price lists, and an order sheet at the city of San Francisco, . . . addressed to a resident of the city of Woodland, in said county of Yolo, the said circular letter, price lists and order sheet constituting an advertisement of certain alcoholic liquors offered for sale by your petitioner; that it appears upon the face of the said complaint that all and singular the acts constituting the alleged offense as aforesaid were committed wholly in the city and county of San Francisco, . . . and wholly without the said city of Woodland and the said county of Yolo." The petition then alleges that it does not appear upon or from the face of the complaint that the offense, purporting to be therein and thereby charged against the petitioner, or that any offense whatever, was committed within the limits of the county of Yolo or within the jurisdiction of the said court of Woodland township; "that the said court of Woodland township has no jurisdiction of your petitioner or of the attempted criminal proceeding."

The complaint filed in the respondent court against the petitioner and to restrain proceedings under which this proceeding is instituted is made a part of the petition and attached thereto.

It is charged in said complaint that, on or about the twenty-eighth day of May, 1913, the defendant corporation mailed a letter at the city of San Francisco addressed to a Mr. James Monroe, at Woodland, California; that said letter, which characterized itself as a "circular," contained an offer, designated therein as "our final offer," to consign to the said Monroe, at any time within thirty days from the date of the letter, "one full quart of this fine 'Old Reserve' whiskey, by return express, for only 50 c.," (no doubt meaning fifty cents). Said circular letter then proceeds: "This is a special introductory offer we are making to NEW customers only—and if YOU have never tried 'Old Reserve' Whiskey—we want you to try it NOW. We want to Show you. We want to place some of our fine 'Old Reserve' Whiskey before you so you may know how rich, pure and delicious it really is—and here's the greatest offer you ever heard of.—Send us 50 cents—that's All and we will send you a full quart bottle of our fine 'Old Reserve Whiskey—in a strong, plain case, by return express.—Remember—It's Pure Kentucky Whiskey and every bottle has our absolute guarantee that it is fully aged and full measure—as good and pure as it is possible to produce.—You take no chances. Our guarantee is fair and square—it means what it says—we must send you a quality that will please you in every way—and we will do it.—We lose Money shipping one quart means a loss to us—but we want your trade—and we know when you have tried this whiskey, you will be so pleased with it, that you will send us your future orders for at least a gallon at \$3.60 or four full quarts for \$4.00 and then we pay all the express charges.—A Wonderful offer. No one else offers a single quart of whiskey at our price of 50 cents a quart—no one else would be willing to lose money on a one quart shipment as we are doing simply to prove our claims for 'Old Reserve'.—Take us up on this offer—order this whiskey—try it—use all you want—and if you don't find it all we claim—the finest you ever tasted and the greatest value you ever saw—we will return your money together with all express cost without a word.—Now, Rush Your Order. Cut out this coupon—fill it in—and mail it to us with 50 cents in stamps, coin or money order—and the full quart of fine 'Old Reserve' Whiskey will go by first express. You must pay express charges on this

single quart shipment. The cost is small—only 25c to 50c, according to distance from San Francisco, but no matter how much expressage you paid, you will get a wonderful bargain. Golden & Co. 130 Pine St. San Francisco, Calif.

“Golden & Company. Not good after 30 days.”

Accompanying said letter were the price lists of the various brands of whiskies and wines and “miscellaneous liquors” handled and sold by the petitioner and an order sheet, in blank, to be used by the party to whom the letter was addressed, if he elected to purchase any of the liquors referred to in the letter and the price lists.

Manifestly, the ultimate question presented here, as is stated in the petition as well as is necessarily implied from the nature of this proceeding, is one of jurisdiction. That the respondents, as a magistrate’s court and the presiding magistrate thereof, are wholly without legal authority or jurisdiction to examine the charge set forth in the complaint assailed by this proceeding, is sought to be sustained upon the following grounds: 1. That, within the meaning of the language of the Local Option Law, there can be no solicitation of orders for the sale of alcoholic liquors within no-license territory unless the sale and delivery of such liquors are made or intended to be made within such no-license territory; 2. That section 15 of said act contemplates and intends that the solicitation interdicted thereby must be prosecuted in person within such territory by the persons or corporations, etc., mentioned in said section; or, in other words, that the solicitation contemplated by the section cannot be effectuated except it be done in person by such persons or corporations themselves or their agents, which proposition implies, of course, that they or their agents must be physically present within such territory when such solicitation takes place.

In addition to the points above specified, it is urged by Messrs. Golden and Pritchard, in a brief filed by them as *amici curiae*, that section 15 of said act contravenes certain constitutional guaranties.

Section 15 of the Local Option Law reads as follows: “It shall be unlawful for any person, company, association or club, within no-license territory, to solicit orders, take orders or make agreements for the sale or delivery of alcoholic liquors; *provided*, that this shall not apply to the taking of such orders

from a registered pharmacist at his place of business, or to the taking of orders for alcoholic liquors on the premises where stored or manufactured, under the conditions stated in section 16 hereof."

Section 16 provides: Nothing in this act shall be interpreted as rendering it unlawful to keep alcoholic liquors for distribution, or to sell or distribute such liquors, in no-license territory in the manner following: 1. The serving of such liquors by any person at his own home to members of his family or to his guests, as an act of hospitality, when no money or thing of value is received in return therefor, and when said home is not a place of public resort; 2. The serving or dispensing of such liquors by a registered pharmacist for *bona fide* medical purposes, upon certain specified conditions, among which is that such liquors so dispensed shall not be drunk upon the premises where dispensed; 3. The selling of alcohol by a registered pharmacist for other than beverage purposes, upon certain designated conditions; 4 and 5. The selling of wine by a regularly licensed pharmacist for sacramental purposes only, on certain conditions, and the distributing of wine, at the sacramental service of any religious organization; 6. "The keeping of alcoholic liquors at cellars, vaults or warehouses, receiving orders at such cellars, etc., for said liquors, and the shipping of the same therefrom; *provided*, said liquors are not distributed or delivered to any person or place in no-license territory within the county in which such cellars, etc., are located, except when delivered to a common carrier for shipment to a place outside of no-license territory; 7. The keeping of alcoholic liquors on the premises where manufactured, receiving orders at said premises for such liquors, and the shipping of the same from such premises; *provided*, said liquors are not distributed or delivered in no-license territory within the county in which such premises are located in quantities of less than two gallons, and are not delivered to any person, or place in such territory within said county except as follows: (a) to a common carrier for shipment to a place outside of said no-license territory; (b) to other manufacturers of alcoholic liquors at the premises where they manufacture such liquors; (c) to cellars, vaults or warehouses where such liquors are stored or distributed as provided in the sixth paragraph of this section; (d) to any person at his or

her permanent residence; (e) to registered pharmacists at their place of business."

It will be observed that section 15 exempts from its operation, to the extent of *taking orders* for alcoholic liquors, registered pharmacists and those places where such liquors are stored or manufactured, as provided by paragraphs 6 and 7 of section 16. There is no exception made as to the soliciting of orders, unless it may be said (and perhaps it may reasonably be so held) that such authority is necessarily implied from the provision that such orders may be taken from registered pharmacists. The provision authorizing the taking of orders on the premises where alcoholic liquors are stored or manufactured undoubtedly has reference to sales by the manufacturers of intoxicants, and does not, therefore, authorize the soliciting or taking of orders for such liquors *from them*, to be delivered *to them*. It is quite clear, then, that, except possibly as to registered pharmacists, regularly licensed to engage in the prosecution of their business in no-license territory, no one has a legal right to solicit or take orders for intoxicants from persons within such territory.

Now, as above indicated, the first point urged by the petitioner is that the provisions of the Local Option Law do not and were not intended by the legislature to prohibit the solicitation within no-license territory of orders for the sale or delivery of alcoholic liquors, unless the liquors to which such solicitation relates are to be delivered within such territory. Indeed, the contention goes so far as to involve the maintenance of the proposition that, while the legislative department of the government may, in the exercise of the police power, prohibit the solicitation or the making of agreements for the sale of intoxicating liquors within no-license territory where such liquors are to be delivered therein, legislation inhibitory of such solicitation or the making of such contracts within no-license territory, where the liquors are to be delivered outside the limits of such territory, would be invalid as in restraint of trade or in contravention of the right of contract.

In the case of *Ex parte Anixter*, 22 Cal. App. 117, [134 Pac. 193], the petitioner sought to be relieved, through the writ of *habeas corpus*, of the effect of a judgment of imprisonment imposed upon him by the recorder's court of the town of Winters upon a conviction of the crime of soliciting orders

within the limits of said town for intoxicating liquors, contrary to the provisions of an ordinance adopted by the governing board of Winters. It was there argued, as here, that the ordinance could not validly be so construed as to prevent persons from soliciting orders within the incorporated limits of Winters where the liquors to which such orders related were to be delivered outside of said limits, since such construction would operate in restraint of trade. In remanding the prisoner, and reviewing the point thus suggested, this court in effect held that the right of contract or the principles supporting inhibitions against legislation in restraint of trade could have no application in cases of prohibitory or regulatory legislation with respect to the traffic in alcoholic liquors. The writer of this opinion is the author of the opinion in the Anixter case referred to. It was then his impression that, since it is settled beyond all peradventure that the traffic in such liquors is, in a legal aspect, a nuisance *per se*, which is merely to say that the traffic may exist, if at all, only by and through the sufferance of the government and not as of right, the state, or any of its subdivisions to which such powers are committed, may, in the exercise of the powers of police, not only suppress the traffic entirely, but, in addition thereto, may adopt any regulation or character of legislation which will tend to remove every manner or form of temptation which might be introduced and which might have the effect of encouraging the use of such liquors or of generating in the people living within the territory in which the traffic is prohibited a sentiment favorable to the resumption therein of such traffic. In other words, I had always been of the opinion that all legislation, whose purpose was to minimize the use of intoxicants as beverages, whether such legislation was of a prohibitory or merely of regulatory character, solely applied to and operated upon the personal conduct of the inhabitants constituting the community or territory affected thereby, and, as stated, could have no relation to or in any manner affect or impair, in legal contemplation, the right of contract; that, therefore, the state, or any of its political subdivisions to which it had confided the right to execute within their respective limits the police power, could legitimately declare, if it so elected, that no transactions of any kind or character whatsoever respecting intoxicating liquors,

either as to the use thereof or the traffic therein, shall be inaugurated, conducted, or carried on within its boundaries. This power in the state with respect to the subject of intoxicating liquors I assumed had become absolutely complete and, indeed, supreme, since by the act of Congress, known as the "Wilson Act" (26 Stats. 313, chap. 728, [U. S. Comp. Stats. 1901, p. 3177, 3 Fed. Stats. Ann. p. 853]) intoxicating liquors had been expressly exempted from the operation of the commerce clause of the federal constitution. (*Delamater v. South Dakota*, 205 U. S. 93, [10 Ann. Cas. 733, 51 L. Ed. 724, 27 Sup. Ct. Rep. 447].) I hence concluded that it was within the rightful power of this state and its municipalities, to which has been delegated by our constitution full power in matters of the public police (Const., art. XI, sec. 11), to declare that the mere act itself of soliciting orders for intoxicating liquors or the making of agreements within its limits for the sale thereof, irrespective of the place where it was proposed or intended to deliver the liquors to which such solicitation or agreements related, whether within or without the boundaries of the state or political subdivisions within which such transactions were prohibited, and regardless of whether the result of such solicitation was a sale or an agreement to purchase any such liquors, shall constitute a public offense, punishable as the legislative power might deem necessary or wise to direct. I believed that such legislation could not be held to have extra-territorial operation, nor, therefore, operate in restraint of trade, since its effect was directly upon those within the territory affected thereby, and could in no manner or degree interfere with the right of persons living or being in a license territory to solicit or contract for orders for such liquors in such territory. I conceived that, in the views thus entertained and expressed, I was supported by many, if not all, of the cases in which the power of the state with respect to the use and business of trafficking in alcoholic liquors has been fully and exhaustively reviewed and expounded and held to be (particularly since the Wilson Act, removed such liquors from among the subjects affected by interstate commerce), plenary, and, indeed, unhampered by any of the constitutional guaranties whereby certain other occupations, in themselves useful and necessary, yet subject to police regulation, are justly shielded against the effect of

discriminatory legislation. Of those cases, I need mention only two, of which the one which may first be mentioned is that of *Ex parte Christensen*, 85 Cal. 208, 213, [24 Pac. 747], where it is said that the governing power may impose such conditions upon the existence of the traffic in alcoholic liquors as it pleases, and that, "even if it be conceded that *the conditions were arbitrary, they were within the power of the board.*" The other is the case of *Delamater v. South Dakota*, 205 U. S. 93, [10 Ann. Cas. 733, 51 L. Ed. 724, 27 Sup. Ct. Rep. 447], wherein the court was called upon to consider and pass upon certain objections, based upon constitutional grounds, urged against the validity of a statute of the state of South Dakota, imposing an annual license charge upon "the business of selling or offering for sale" intoxicating liquors within said state, "by any traveling salesman, who solicits orders by the jug or bottle in lots less than five gallons." Upholding the statute and replying to a branch of the argument set up in support of the claim that the legislation involved therein was invalid, the court, among other things, said: ". . . The proposition here relied on is widely different, since it is that, despite the Wilson Act, the state of South Dakota was without power to regulate or control the business carried on in South Dakota of soliciting proposals for the purchase of liquors, because the proposals related to liquor situated in another state. *But the business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where it was contemplated the proposals would be accepted or whence the liquor which they embraced was to be shipped.*" Again, in that case, the court, after referring to certain cases, notably *Hooper v. California*, 155 U. S. 648, [39 L. Ed. 297, 15 Sup. Ct. Rep. 207], in which it was held that a state has the authority to prohibit and penalize the act of procuring, or agreeing to procure, any insurance from any foreign insurance company, unauthorized to do business within the borders of such state under the laws thereof (Pen. Code, sec. 439), uses the following language: "It follows that the authority of the states, so far as the sale of intoxicating liquors within their borders is concerned, is just as complete as is their right to regulate within their jurisdiction the making of contracts of insurance. It hence must be that the authority of the states to forbid agents of

nonresident liquor dealers from coming within their borders to solicit contracts for the purchase of intoxicating liquors which otherwise the citizen of the state 'would not have thought of making' must be as complete as is such authority in relation to contracts of insurance, especially in view of the conceptions of public order and social well-being which it may be assumed lie at the foundation of regulations concerning the traffic in liquor."

From the foregoing authorities and many others which might be mentioned, I concluded that, if it be within the power of the states to prohibit the soliciting of orders for the sale of intoxicating liquors within their territorial limits, regardless of where such liquors were to be consigned or delivered, it was equally within their right in the exercise of the supreme control which it must be conceded that they possess over the subject of intoxicating liquors, to delegate like power to the municipalities within their borders (Const., art. XI, sec. 11), or to other of their political subdivisions, whose electors may themselves, by virtue of legally exercisable authority, invoke the application, within their respective jurisdictions, of the provisions of a general law, which determines the extent and conditions to and upon which such liquors may be used. (Stats. 1911, p. 599.)

The foregoing observations, let it be understood, are not here made for the purpose of overthrowing the position of the petitioner in this proceeding upon the question to which they relate or of confuting the argument advanced in support of said position; but they are merely ventured as explanatory of the reasons which led to what now appears from a recent decision of our supreme court, to have been an erroneous conclusion reached by this court in the Anixter case, as to the point referred to. The former court, in the case of *Ex parte Anixter*, 166 Cal. 762, [138 Pac. 353], the self-same case which was before this court and above referred to (the petitioner, after being remanded by this court, having petitioned the supreme court for and there claimed the right to his release, through the writ of *habeas corpus*, for the identical reasons urged in this court), has held that the petitioner here is right in his contention that the legislative authority of a political subdivision of the state cannot enforce penalties against those soliciting orders within its jurisdiction for intoxicating

liquors, in cases where such liquors are to be delivered outside the limits of such subdivision. The court, in an opinion in that case, prepared by a justice of acknowledged learning and acumen and noted for the marked clearness with which he invariably expounds and applies to concrete cases the principles of jurisprudence, says: "The incorporated town of Winters in law cannot exercise control over the welfare of those beyond its corporate limits, and touching the liquor traffic its utmost right of control is to prevent soliciting and contracts of sale made within its limits for delivery of intoxicants therein. As a court, between two permissible constructions of a statute, will always give to it that which sustains its validity, so here it will be held that the ordinance applies, and applies only to the soliciting and contracting for the sale of intoxicants to be delivered within the town limits. But the town of Winters has no legal right to say that a contract may not be made within its limits for the sale of intoxicants to be delivered without those limits. Such an ordinance would not be a reasonable exercise of the police power and would plainly be in restraint of contract and of trade."

I take it that the principle thus enunciated is no less applicable to the Local Option Law where the provisions thereof are invoked by the electors of a municipality or of any other territory in the state to which the provisions of said law may be made to apply than to a municipal ordinance, and that, therefore, although the Local Option Law has been adopted by the electors of the city of Woodland and its provisions made applicable to the territory embraced within the incorporated limits of said city, the act of soliciting orders or making agreements within said city for the sale or delivery of intoxicating liquors cannot be prevented or penalized, where the intoxicants as to which such solicitation is prosecuted or agreements are made are to be delivered without or beyond such incorporated limits.

The proposition thus decided, however, is of no importance here, so far as is concerned the decision of the question presented for determination in this proceeding. As before stated and as is obvious, the sole question submitted here is whether the respondents have jurisdiction of the subject matter of the complaint and of the person of the petitioner. It is true that, while the complaint charges that the solicitation was carried

on within the incorporated limits of Woodland, it does not directly appear from or upon the face of that document where the liquors to which such solicitation related were to be delivered—whether within or without the limits of said city. But the complaint nevertheless states an offense of which the respondents have jurisdiction, not as a justice's court and the justice thereof, but as a magistrate's court and a magistrate, since the penalties prescribed for a violation of the provisions of the act are in excess of those within the power of a justice's court to impose under the law. (Pen. Code, sec. 1425.) The language of the complaint is, in other words, so far as the element of the offense of which I am now speaking is concerned, in the language of the statute, and, abstractly viewing it, the complaint alleges facts constituting a charge which the respondents, as a magistrate's court and a magistrate, have the legal authority to preliminarily examine and to pass upon for the purposes of such hearing (assuming, of course, that the solicitation of orders by mail is an act which comes within the inhibitions of the statute), and it is sufficient to charge the offense in the language of the statute; for it would be a perfect defense to the charge of soliciting and "the defendant would be completely exonerated" if, either at the examination or the trial, he should make "a showing that in fact the delivery was not to be made within the territorial limits of the town." (*Ex parte Anixter*, 166 Cal. 762, [138 Pac. 353].)

The next point urged against the validity of the proceedings pending before the respondents is, as seen, that the crime of soliciting orders, taking orders or making agreements within no-license territory for the sale or delivery of intoxicants therein cannot be committed, within the contemplation of section 15 of the statute, unless such solicitation or making of agreements be carried on within such territory in person by a party or his agent. In other words, the contention is that, to constitute either or any of the offenses denounced by said section, the party charged or his agent must be shown to have been physically present within the no-license territory and there in person have solicited or taken such orders or made such agreements. This construction of said section is arrived at by a grammatical analysis of the phraseology thereof, whereby, considering the construction concretely, it

is sought to be established that the legislature intended the language of the section to be understood as it may be paraphrased as follows: "It shall be unlawful for any person, corporation, firm, company, etc., being at the time within no-license territory, to solicit orders, take orders or make agreements within such territory for the sale or delivery of alcoholic liquors," etc.

In support of the construction thus arrived at, it is asserted that, grammatically, the phrase, "within any no-license territory," as used in the section, "necessarily qualifies the series of nouns commencing with the word, 'person' (as used therein), rather than the verb, 'solicit,' or the still more remote phrase, 'for the sale or delivery.' " As sustaining that theory of the legislative intent, so far as said section is concerned, attention is directed to the rule laid down in section 73 of Black's "Interpretation of Laws" as follows: "As a general rule, relative, qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, *unless the context or the evident meaning of the enactment requires a different construction.*" (The italics are mine.) Or, as the rule is stated in *Piper v. Boston etc. R. R.*, 75 N. H. 435, [75 Atl. 1041], "the general rule of grammar and law is that relative terms refer to the next preceding antecedent, *unless it is clear from the context that a different one was intended.*" (Italics mine.)

Not only by implication, from the fact of their reliance upon the rule of interpretation above quoted, do counsel for the petitioner concede that the construction of laws or contracts according to strict grammatical rules will not prevail where such construction is *clearly* opposed to the context or evident spirit or purpose of such laws or contracts, but they expressly admit the soundness of the proposition in their brief. They vigorously contend, however, that their construction of section 15 is in perfect harmony with the spirit and purpose of the local option law. The argument is that the sole and paramount object of said law is, as is claimed to be true of all laws licensing, regulating, or prohibiting the sale of liquor, to control, regulate, or prohibit the *public traffic* in intoxicants; that it is directed against the saloons and places where intoxicating liquor is sold and drunk upon the premises; that the act does not, even if it were competent for the

legislature so to ordain, attempt to "control or direct individual use of liquor, since it expressly exempts from the operation of its penalties, the act of keeping intoxicants at one's home in no-license territory for family use or the purposes of hospitality; that, therefore, the solicitation for orders for intoxicants to be used for such purposes is an essential incident of said right."

But, so the argument runs, even assuming that the soliciting of orders from individuals within no-license territory was intended to be and is proscribed, since the law cannot punish for sales of liquor committed outside of such territory, "it cannot be presumed that the usual and ordinary incidents of sales are prohibited. Accordingly," so it is then declared, "it is the personal soliciting by those within the territory rather than advertising or the mailing of circulars by those outside the territory that is sought to be prevented."

I cannot agree with the petitioner in its construction of section 15 of the Local Option Act, nor am I impressed with the various arguments offered in support of such construction, some of which are briefly given in the foregoing statement of its conception of the intent and scope of said section. It may well be conceded that the language of said section, when tested solely by the strict rules of grammar, appears, upon its face, to be involved in some obscurity. At any rate, it can be said that the legislative intent as to the scope of the section could well have been expressed with a greater degree of perspicuity, or, in other words, its phraseology so arranged as that there would be left no ground upon which there could exist any difference of opinion as to what I conceive must be its true import. But, when examined under the test of familiar rules of statutory construction, aided by the light afforded by the vital object which is obviously sought to be accomplished by the legislation of which it forms a part, no doubt can reasonably arise that said section was intended by the legislature to prevent, if possible, or to penalize, if committed, the solicitation of orders, the taking of orders or the making of agreements within no-license territory for the sale or delivery of intoxicating liquors in such territory, irrespective of the manner in which such acts may be accomplished. By this I mean to say that one who solicits orders or makes agreements through the instrumentality of letters,

sent to the addresses in no-license territory of persons residing or being therein, thus brings himself as clearly under the ban of the statute as if he were to prosecute such solicitation or make such agreements in person within the boundaries of such territory.

A fundamental canon of construction is that every statute must be construed with reference to the object intended to be accomplished by it. (*People v. Dana*, 22 Cal. 11.) "In order to ascertain this object it is proper to consider the occasion and necessity of its enactment, . . . and the statute should be given that construction which is best calculated to advance its object, by suppressing the mischief and securing the benefits intended." (36 Cyc., p. 1110, and cases cited in the foot notes.) And, where a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with sound sense and wise policy, the former should be rejected and the latter adopted." (*In re Mitchell*, 120 Cal. 384, 386, [52 Pac. 799].) The rule last stated is merely a repetition in another form of the rule relied upon by the petitioner and above quoted, and has peculiar force in its application to the proposition that where a statute may be given a grammatical construction leading to a result in manifest opposition to its purpose and intent or in circumvention of its paramount object, such construction will be rejected and one adopted which will effectuate or carry out the object designed by the legislature to be accomplished by the act.

Aided by the foregoing rules, no difficulty seems to be in the way of reaching an accurate conclusion as to the meaning and scope which it was the legislative intention that section 15 of the act in question, particularly the words, "solicit orders," should bear and possess.

As to the general object and the legality of the legislation involved in the local option law, and incidentally noticing some of the arguments set up in support of the petitioner's position, it may first be conceded that the real root of the mischiefs and evils which too frequently directly result from the use of intoxicants is in the public retail traffic therein, and that it is true, as counsel for the petitioner maintain, that legislation bearing upon the question of intoxicating liquors is primarily directed against such traffic. It is also true that

the individual act of using or consuming intoxicants appertains to or comes within the category of a citizen's personal liberties and with which act governmental interference can legally be interposed only where the individual use of such liquors becomes intoxication or alcoholism and thus an infringement of the personal rights and liberties of others. But, while, as stated, this is all true, it cannot for a moment be doubted that the great ultimate object of all legislation upon the subject of intoxicating liquors is, as is obviously true of the statute in question, to reduce to the lowest minimum the individual use and consumption of such liquors as beverages and thus diminish intemperance. And, while the state may not interfere with the individual act of consumption, where such act does not develop a condition of which it may legally take cognizance, it may, nevertheless, adopt such reasonable regulations relative to such private or individual use and consumption as will prevent it from becoming a public evil or responsible for conditions or mischiefs equal in enormity or degree to those proceeding directly from the traffic itself. Indeed, it is, as before intimated, within the constitutional rights of the legislature, in the exercise of the police power of the state, to establish any regulation which may tend to remove every temptation to use intoxicants as beverages under any circumstances and which, if permitted to exist, might have the effect of creating a general sentiment in no-license territory favorable to the revival of the traffic therein. It is, therefore, within the constitutional competence of the legislature to prohibit, and to authorize punishment for a violation of the prohibition, every act and form of soliciting for orders within no-license territory for the sale of intoxicants, to be delivered in such territory, regardless of the use to which they may be intended to be put—that is to say, irrespective of whether the orders so solicited related to individual or other uses. In the case here, the statute has made it unlawful to solicit such orders from all persons within no-license territory, except, perhaps, as before suggested, registered pharmacists, and, although, as shown, individual use of liquors at one's home for the purposes specified in section 16 is permitted, it is very clear, not alone from the manifest general purposes of the law, but also from the fact that the taking of orders from individuals for liquors to be used at their

homes is not, as is true in the case of pharmacists, authorized by section 15, either expressly or by implication, that the act of soliciting orders from individuals for household purposes was intended to be and is enjoined by the statute. It is, in other words, contrary to said act to solicit orders from or make agreements with any person within the limits of no-license territory for intoxicants, to be delivered therein, except registered and licensed pharmacists. If this be not true, then, manifestly, the law has little, if any, practical meaning for the purposes for which it was passed.

Nor is it important, so far as is concerned either the act of soliciting orders or that of making agreements for the sale or delivery of intoxicants, whether the *sale* contemplated by such solicitation or agreements is consummated outside of the territory, for the gist or gravamen of the offense of soliciting orders or that of making agreements for intoxicants within such territory is in the solicitation or the making of the agreements *with the purpose and intent of delivering such liquors therein*. It is, in other words, not unlike the crime of burglary, which consists of the mere entering of a building with the intent to steal or commit some other crime, irrespective of whether or not any property be actually stolen or any other act which in itself would constitute a different crime was actually committed.

The foregoing views are, I think, in perfect accord with those of the supreme court as expressed in the Anixter case, above referred to, concerning an ordinance whose language is very much like that contained in section 15 of the act under consideration.

It has already been declared that by section 15 it was intended to enjoin every form of solicitation of orders for intoxicants. By this it was intended to be said that, viewing section 15 by the light of the obvious paramount purpose sought to be achieved by the legislation represented by the act, no other reasonable meaning can be deduced from it than that thus it was intended to prevent every kind and character of solicitation, whatever may be its form, whether in person or by letter or other like communications sent either from without or from within no-license territory through the United States mail or by messengers and addressed to persons within

such territory, except pharmacists, at their residences or places of business.

The construction for which the petitioner contends would render the act woefully impotent for the accomplishment of its purpose as a prohibitory measure. It would, indeed, open up an avenue whereby the central object of the statute could be frustrated, almost, if not quite, to the extent of rendering it nugatory. It would, in brief, countenance a gross evasion of the evident spirit and intent of the statute, for liquor dealers engaged in business outside the borders of no-license territory could, with impunity, and immunity from punishment carry on a mail order liquor traffic within such territory (*Rose v. State*, 4 Ga. App. 588, [62 S. E. 117]), and thus impart to the act an effect which would make it practically prohibitory of prohibition rather than prohibitory of the liquor business. Besides, such a construction would have the effect of granting to persons licensed to conduct the liquor trade outside the limits of no-license territory privileges exercisable within such territory which cannot be enjoyed by persons residing or doing business therein—that is to say that, while persons engaged in the liquor business outside the boundaries of no-license territory could solicit orders and make agreements touching intoxicants, manufacturers of such liquors maintaining and carrying on their business as such within the limits thereof cannot legally do so, a discrimination which the legislature doubtless has the right to make as to the liquor traffic but which, from the manifestly absurd consequences which would follow therefrom, it cannot reasonably be supposed to have intended; for thereby the city embracing such territory or the county in which it is situated would not only be deprived of its revenues, but of the power of exercising the proper control of the traffic which results from the imposition of the license. (*People v. Swenson*, 162 Mich. 397, [127 N. W. 302].)

Counsel, however, perceive no difference between the act of soliciting orders by means of letters or circulars sent through the mail to particular individuals in no-license territory and the circulation in such territory of newspapers, containing among others relating to other matters, advertisements extolling the quality and giving the prices of certain brands of liquor. But there is an obvious distinction between the two

propositions, and it lies in the fact that, in the one case, the minds of particular persons are directly addressed upon a single subject and their attention thus specially called to the subject matter of the letter or circular, while in the other no particular person is appealed to upon any one of the various matters which are usually referred to in or given publicity through the medium of the advertising columns of a newspaper of general circulation. "Solicit," according to Webster's dictionary, is "to apply to for obtaining something; to awake or excite to action; to arouse a desire in," etc., and it may apply to cases where one asks another for a bribe or asks another to commit bribery or larceny and other offenses. (Black's Law Dict., p. 1105.) It implies *personal* petition and importunity addressed to a particular individual to do some particular thing, and it is unquestionably in this sense that the term is used in the statute. If our statute against bribery in terms, as in effect it does, had been made to say that a public officer who *solicited* a bribe for the performance of some act within his official duties, and the officer should, by letter, solicit the payment to him of a bribe, it would not for a moment be questioned that such act of the officer would constitute a solicitation of a bribe within the meaning of the law. So it is and must be true here. A letter or circular, such as the one involved in this case, addressed to a particular person, and emphasizing in alluring terms the superior quality of certain commodities, giving the prices at which they may be purchased, and vigorously importuning the addressee to buy and use the same, can be no less a *personal* solicitation for orders for such commodities than would be the solicitation of a bribe through the medium of a letter or, indeed, than would be the case of like solicitation prosecuted *in person* by the party by whom such letter or circular is sent out. An advertisement can in no sense be held to be a *personal* petition or request addressed to any particular person. The ordinary advertisement so published has the effect only of directing attention, in a general way, to the matter advertised, and is, as before stated, addressed to the general public, wherever such newspaper is circulated.

But there is ample judicial authority for holding that a solicitation of orders by mail for the sale of liquors to be delivered in no-license units within which solicitation of such

orders is in general terms forbidden by law is a violation of the legislative mandate.

In *Rose v. State*, 4 Ga. App. 588, [62 S. E. 117], the question is elaborately and ably examined in a case calling for the construction of a section of the Penal Code of the state of Georgia which provided: "If any person shall sell, contract to sell, take orders for or solicit personally or by agent, the sale of spirituous, malt or intoxicating liquors in any county or town or municipal corporation or militia district or other place where the sale of such liquors is prohibited by law, high license or otherwise, he shall be guilty of a misdemeanor." The counties of the state of Georgia are given the authority by a general act of the state legislature to prohibit the traffic in intoxicating liquors within their respective jurisdictions. The defendants were accused of personally soliciting the sale of intoxicating liquors within Bartow County in said state, "said soliciting being made by and through the United States mail, by mailing letters to the citizens of Bartow County from the city of Chattanooga, Tenn., containing self-addressed envelopes, order blanks, and other printed and written matter soliciting the sale of said liquor, said letters having been mailed and delivered" to certain named citizens of said county. It was claimed in that case, as here, that the solicitation of orders for liquor by mail did not constitute the solicitation contemplated or intended by the code section, but that the section applied only to solicitations made by one in person, "and that for that reason the solicitation of sales, referred to, whether it be by the seller himself or by his agent, must be by personal visit to the locality where such sales are prohibited." In support of that contention, special emphasis was placed upon the language of the section, "solicit *personally*." The court rejected the construction thus given the section and the argument advanced in support of it, saying, *inter alia*: "When we consider that the intention of the act, to which we have already referred, was to make criminal the introduction of intoxicants from a county where the sale of such intoxicants was legal into a county where the sale was prohibited, it is readily to be seen that, while the solicitation which was made penal could be a personal solicitation, it was none the less made a crime for any person, either himself or by an agent, *in any way*, to solicit the sale of intoxicating

liquors where it was prohibited." Again the court said: "We have no difficulty, therefore, in holding that it was the intention of the legislature (in order to make the prohibition laws of those counties that might adopt them effective) to absolutely prohibit the encouragement of purchases of intoxicating liquors in counties which had prohibited the sale, *by any kind or form of solicitation* (italics mine), except that licensed sellers might solicit orders from licensed druggists and licensed physicians."

In *Hayner v. State*, 83 Ohio St. 178, [93 N. E. 900], the Ohio supreme court sustained a verdict whereby the defendant was convicted of the crime of soliciting orders within "dry" territory for intoxicating liquors, said soliciting having been done by mail, under circumstances precisely the same as those disclosed by the complaint in this case, the court, among other things, saying: "We assume that the act of soliciting may be done by letter as well as in person."

In *State v. Holmes*, 68 Wash. 7, [122 Pac. 345], the defendant had been convicted of the charge of soliciting orders for intoxicating liquors within a dry unit, under a statute of the state of Washington making such solicitation a misdemeanor. The soliciting was done, precisely as here, by means of a circular letter sent through the United States mail by the defendant from the city of Seattle, where the sale of intoxicating liquors was then permitted by law, to a citizen of the city of Everett, in said state, which was a unit in which the sale of such liquors was then unlawful. The supreme court of that state upheld the judgment following the verdict of conviction upon the authority, principally, of the case of *Rose v. State*, of which it had this to say in its opinion in the Holmes case: "Upon every point discussed, we regard that opinion as logical, unanswerable, and well sustained by authority. Its reasoning and conclusions, which we approve and adopt, when applied to the facts in this case, not only support the proposition that appellant's act was an unlawful solicitation of orders for intoxicating liquors in a dry unit, but are also convincing to the effect that such unlawful act was committed in the city of Everett, where appellant's letter was received by Swalwell." (See, also, *United States v. Thayer*, 209 U. S. 39, [52 L. Ed. 673, 28 Sup. Ct. Rep. 426]; *In re Palliser*, 156 U. S. 266, [34 L. Ed. 514, 10 Sup. Ct. Rep. 1034]; *Horner v.*

United States, 143 U. S. 207, [36 L. Ed. 126, 12 Sup. Ct. Rep. 407]; *Burton v. United States*, 202 U. S. 344, [6 Ann. Cas. 362, 50 L. Ed. 1074, 26 Sup. Ct. Rep. 688]; *Danciger v. Stone*, 187 Fed. 861.)

As is shown by the above cited cases, and, indeed, as necessarily follows from the conclusion arrived at here with respect to the scope of the language, "solicit orders," as employed in the statute in question, the crime charged against the petitioner was committed upon the receipt of the circular letter in the city of Woodland by the party to whom it was addressed, and the venue of the offense is consequently in Yolo County, in which the city of Woodland is situated. (See cases above cited, particularly *United States v. Thayer*.)

I have carefully examined the brief filed here by counsel *amici curiae*. It is unnecessary to review in detail the arguments and authorities presented therein. It is enough to say that most of the points made in said brief are in effect answered in the foregoing views of the vital questions submitted by this proceeding. It may be remarked, however, that many of the cases cited by counsel in the brief referred to have no application to the case at bar. The cases referred to have to do with legislation purporting to control, as a police regulation, businesses which are in themselves legitimate, and which, though subject to the police power, are essential to the well-being of society and which can neither be suppressed nor so regulated as that unjust, burdensome, or discriminatory conditions may be imposed upon them or the right to conduct them. For instance, the slaughter house, the cemetery, and other like cases, cited by counsel as *amici curiae*, obviously deal with occupations in which people have the inherent right to engage, because they are, unlike the liquor traffic, necessary and useful; yet they are of a character that, unless managed in a proper way, they may become a source of great injury to the comfort and health of communities. Therefore, as stated, the state, in the exercise of its powers of police, may regulate the manner of their management so as to prevent, as far as possible, the injurious results to others which are known to come from the prosecution of such occupations; but, as declared, such regulations can neither be prohibitory nor discriminatory in their effect, as is true, in my opinion, as to legislation affecting the liquor traffic.

I think, for the reasons herein stated, that the respondents have jurisdiction of the proceeding of which complaint is here made, and the order to show cause is, therefore, discharged and the writ dismissed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on April 13, 1914.

[Civ. No. 1195. Third Appellate District.—February 12, 1914.]

GOLDEN & COMPANY (a Corporation), Petitioner, v. THE JUSTICE'S COURT OF GUINDA TOWNSHIP et al., Respondents.

INTOXICATING LIQUORS—WYLLIE ACT—SOLICITATION OF ORDERS FOR LIQUOR IN NO-LICENSE TERRITORY.—The application for a writ of prohibition is denied in this case on the authority of *Golden & Company v. Justice's Court of Woodland Township*, ante, p. 778.

APPLICATION for Writ of Prohibition to be directed against the Justice's Court of Guinda Township, Yolo County, and J. H. Norton, Justice of said Court.

The facts are stated in the opinion of the court.

Hoefer & Morris, for Petitioner.

A. G. Bailey, District Attorney, for Respondents.

I. M. Golden, *Amicus Curiae*.

HART, J.—This is an application for a writ of prohibition to restrain the respondents from taking further steps in a certain proceeding, now pending before them, and which is based upon a complaint whereby the petitioner is charged with the violation of the provisions of section 4 of ordinance No. 72 of the county of Yolo, passed by the board of supervisors of said county on the fifth day of September, 1911.

The purpose of said ordinance is the regulation of the business of selling intoxicating liquors in the said county of Yolo. Section 2a provides that ten licenses and no more shall be issued in Yolo County to carry on and conduct the liquor traffic, and then follows a designation of the towns and places wherein the right to carry on said business under the licenses mentioned, when the same are duly issued, may be exercised. No part of the territory in said county known as Guinda township, of which the respondents are the justice's court and the justice of the peace, is included among those in which licenses to conduct the liquor traffic may be issued under said ordinance.

Section 4 of said ordinance provides: ". . . It shall be unlawful for any person, company, association or club, as principal, agent, employee, or otherwise, within the limits of the county of Yolo, to solicit orders, take orders or make agreements for the sale or delivery of alcoholic liquors."

The complaint filed against the petitioner with the respondents is made a part of the petition for the writ applied for here, and from said complaint it appears that the petitioner is charged with soliciting an order in said Guinda township for alcoholic liquors by means of a circular letter, sent through the U. S. mail to a resident of said township at his post-office address therein. The circular letter, which is set out in said complaint, is substantially in the language of the letter involved in the case of *Golden & Company* (the petitioner here) v. *Justice's Court of Woodland Township et al.*, ante, p. 778 [140 Pac. 49], (Civ. No. 1194), this day decided.

Both cases were submitted to this court at the same time and upon the same oral arguments and briefs, both involving precisely the same legal questions. Therefore, upon the authority of the case of *Golden & Company v. Justice's Court of Woodland Township, et al.*, the relief applied for here must be denied and the alternative writ of prohibition accordingly discharged.

Such is the order.

Chipman, P. J., and Burnett, J. concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on April 13, 1914.

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ABORTION. See Criminal Law, 5-9.

ACT OF GOD. See Water and Water-Rights, 3, 4.

ACCORD AND SATISFACTION.

1. SUFFICIENCY OF EVIDENCE TO ESTABLISH IN ACTION TO RECOVER FOR CLEARING A LOT.—In this action to recover a balance alleged to be due for clearing a lot, the evidence justifies a finding to the effect that the original claim of the plaintiff's assignor was extinguished by the execution of an accord and satisfaction. (B. & W. Engineering Company v. Beam, 164.)
2. DEFINITION AND EFFECT OF ACCORD AND SATISFACTION.—The phrase "accord and satisfaction," as it is known and applied in the law, means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. The effect of such agreement when executed is to extinguish the antecedent liability. (Id.)
3. PRIOR CONTROVERSY—EXISTENCE OF BONA FIDE DISPUTE.—An agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement; and before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, the dispute must be shown to be *bona fide*; but it is not required, in order to validate an executed agreement of accord and satisfaction, that the circumstances of the transaction upon which it is founded should affirmatively show that there is room for an honest dispute. (Id.)
4. FOUNDATION FOR DISPUTE—WHETHER ESSENTIAL TO SATISFACTION.—If a debt or claim is disputed at the time of payment, the payment, when accepted, of a part of the whole debt is good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such case is, Was the dispute honest or fraudulent? If honest it affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction. (Id.)

ACCORD AND SATISFACTION (Continued).

5. **BONA FIDE DISPUTE—QUESTION OF FACT.**—The question of the existence of a *bona fide* dispute is a question of fact to be determined by the trial court from all the circumstances of the transaction. (Id.)
6. **DETERMINATION OF QUESTION—IMMATERIAL CIRCUMSTANCES.**—In the determination of that question the mere fact that it might have been held, in an action involving the construction of the original contract, that the plaintiff's assignor could not have been compelled to relinquish any portion of its original claim, was of no consequence in the face of the established fact that it did actually and knowingly accept a lesser amount in full satisfaction and settlement of its claim. (Id.)
7. **CONCLUSIVENESS OF SETTLEMENT—DETERMINATION OF WHICH PARTY WAS IN THE RIGHT.**—Where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake have adjusted existing differences concerning their relative rights and obligations arising out of a valid pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made for the purpose of ascertaining which of the parties was right in the controversy which preceded and constituted the basis of such settlement. (Id.)
8. **GOOD FAITH OF DISPUTE—FINDINGS AND JUDGMENT.**—Where the good faith of the dispute, which is expressly found to be the basis of an executed agreement of accord and satisfaction, follows as an irresistible inference from all the facts and circumstances of the case and the acts of the parties which are found by the trial court to have attended the execution of the agreement, the findings are not open to attack as not sustaining a judgment for the defendant on the plea of accord and satisfaction, although they do not specifically and affirmatively determine that the dispute which preceded the payment of the claim in controversy was genuine and made in good faith. (Id.)
9. **COMPROMISE BY AGENT—RATIFICATION BY PRINCIPAL.**—Where a principal accepts and retains money paid to his agent, with full knowledge that such payment was made, accepted, and receipted for upon the express condition that it was in full settlement of a disputed claim, the principal thereby ratifies the compromise and is estopped to deny the agent's authority to make it. (Id.)
10. **PART PERFORMANCE—WHETHER EXTINGUISHES OBLIGATION.**—SECTION 1524 OF CIVIL CODE.—Section 1524 of the Civil Code providing that "part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new con-

ACCORD AND SATISFACTION (Continued).

- sideration, extinguishes the obligation," has reference only to agreements of release and satisfaction made in cases where the obligation is neither doubtful nor disputed, and has no application to an executed agreement of accord and satisfaction founded upon the settlement and extinction of a disputed debt. (Id.)
11. **ACCORD WITHOUT SATISFACTION—WHETHER BARS DEBT.**—An accord without satisfaction will not operate to bar an action upon a disputed debt. (Id.)
 12. **PAROL EVIDENCE—WHETHER ADMISSIBLE TO PROVE PERFORMANCE.** Parol evidence, even though it involves the subject matter of an executory contract which in itself would be within the statute of frauds, may be resorted to for the purpose of proving performance in satisfaction of the accord. (Id.)
 13. **EXECUTED AGREEMENT—EFFECT TO EXTINGUISH ORIGINAL OBLIGATION.**—Where an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished. (Id.)
 14. **PLEADING—NECESSITY OF SPECIALLY PLEADING ACCORD AND SATISFACTION.**—The settled rule of pleading in this state requires an agreement of accord and satisfaction to be specially pleaded before it can be availed of as a defense. (Id.)
 15. **EXCEPTION TO RULE THAT ACCORD AND SATISFACTION IS TO BE SPECIALLY PLEADED.**—This rule is subject to the exception that if a plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tend to show an accord and satisfaction, the defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer. (Id.)
 16. **AMENDMENT OF ANSWER.**—It is not an abuse of discretion to allow the defendant to amend his answer, at the close of the evidence, by specially pleading the existence of an executed agreement of accord and satisfaction, where the evidence tends to show the existence of such an agreement. (Id.)
 17. **PLEADING AND FACTS CONSTITUTING ACCORD AND SATISFACTION.**—The defense of accord and satisfaction, at the very best, requires nothing more to be pleaded than the payment and acceptance, upon a mutual agreement express or implied, of a certain sum of money or other thing of value in full settlement and satisfaction of a pre-existing and previously disputed obligation. (Id.)

ADVERSE POSSESSION. See Easement; Water and Water-rights, 13-15.

AGENCY. See Accord and Satisfaction, 2; Brokers; Corporations, 1, 2; Insurance, 11.

ALIMONY. See Divorce, 6.

AMENDMENT. See New Trial, 2; Pleading, 3, 4; Sale, 3.

APPEAL.

1. **SUFFICIENCY OF EVIDENCE—SPECIFICATION OF PARTICULARS.**—Where the statement of a case contains no specification nor attempted specification of the particulars in which it is claimed that the evidence is insufficient to justify the findings and decision, the appellate court cannot resort to it, either upon the appeal from the judgment or the order denying a new trial, for the purpose of determining the sufficiency of the evidence to support the findings. (*Holland v. Cauty*, 91.)
2. **STATEMENT OF CASE—SPECIFICATION OF ERRORS—SUFFICIENCY OF EVIDENCE.**—A statement of the case on motion for a new trial, which does not specify nor attempt to specify the particulars in which the evidence is claimed to be insufficient to justify the findings, cannot be considered, either upon the appeal from the order denying a new trial or on the appeal from the judgment, for the purpose of determining the sufficiency of the evidence. (*Hastaran v. Marchand*, 126.)
3. **INSUFFICIENT STATEMENT—WHETHER CURED BY OTHER DOCUMENTS IN TRANSCRIPT.**—The failure of such statement to specify the particulars in which it is claimed the evidence is insufficient, is not cured by the incorporation, elsewhere in the transcript, of two separate documents entitled "Bill of Exceptions," one of which contains several specifications of the insufficiency of the evidence intermingled with argument and the citation of authorities, and the other made up of specifications of errors in law alleged to have occurred during the trial, neither documents being authenticated by the trial judge, nor referred to in the authenticated statement or made a part thereof, nor purporting to set out in narrative form or otherwise the evidence and rulings at the trial, although upon the diminution of the record there was indorsed thereon the certificate of the trial judge that such documents were used on the hearing of the motion for a new trial.. (*Id.*)
4. **SPECIFICATIONS OF INSUFFICIENCY OF EVIDENCE—THEIR OBJECT AND PURPOSE.**—The specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are not required merely for use upon the hearing of the motion for a new trial, but are intended primarily, if not entirely, for the information of the adverse party and the trial court, to the end that they may be fully advised upon the settlement of the statement or bill of exceptions as to what matters of evidence covering the points in controversy should be included therein. (*Id.*)
5. **BRIEFS ON APPEAL—NECESSITY OF STATING OR ARGUING ERRORS OF LAW.**—Alleged errors of law relating to the reception and rejection

APPEAL (Continued).

of testimony, not stated or argued in the brief of the appellant, but merely adverted to in a general way in an unauthenticated document purporting to be a bill of exceptions, will not be considered by the appellate court. (Id.)

6. **STATEMENT OF CASE—ERRORS OF LAW—WHEN REVIEWABLE.**—Errors of law appearing either in a proper statement of the case or bill of exceptions may be reviewed upon an appeal from the judgment, regardless of whether or not an appeal has been perfected from an order denying a new trial. (Id.)
7. **OBJECTION TO EVIDENCE—NECESSITY OF INTERPOSING.**—Errors of law in the admission of evidence are not available on appeal, if no objection was made to the reception of the evidence. (Id.)
8. **SUFFICIENCY OF EVIDENCE—PRESUMPTION ON APPEAL.**—In the absence of an efficient statement of the case or a bill of exceptions, an appellate court must assume that the evidence adduced at the trial fully supports the findings, and justified the denial of a new trial. (Id.)
9. **REVIEW OF CONFLICTING EVIDENCE IN SUIT TO QUIET TITLE.**—Where the evidence in a suit to quiet title is conflicting as to whether a deed was intended to be delivered, and also as to whether it was intended merely as a mortgage, the findings of the jury will not be interfered with on appeal. (Moore v. Gilson, 159.)
10. **STATEMENT OF CASE—ASSIGNMENT OF ERROR AS TO INSTRUCTIONS.**—Where the transcript on appeal discloses that the instructions of the court have not been embodied in the statement of the case, and that no specification of error in the giving of instructions has been made in the statement, the argument of the appellant as to error in such instructions cannot be considered by the appellate court. (Id.)
11. **SILENCE OF RECORD—PRESUMPTION.**—On appeal from the judgment it will be presumed that the trial court ruled upon a demurrer to the complaint, if the record fails to show that the court did not rule thereon. (Murdough v. Murdough, 179.)
12. **ASSIGNMENT OF ERROR—GENERAL STATEMENT AS TO RULINGS ON EVIDENCE.**—A general assignment of errors in the admission or rejection of evidence, by the statement in the appellant's brief that an examination of the record will satisfy the court of the correctness of his position, will not be considered on appeal. (Id.)
13. **ABSENCE OF BRIEFS AND ORAL ARGUMENT—AFFIRMANCE.**—Where no oral argument is made nor brief filed on an appeal from a judgment and an order refusing a new trial, the appellate court will not assume the burden of investigating the merits of the appeal, but will affirm the judgment and order. (McNutt v. Pabst, 232.)

APPEAL (Continued).

14. **TIME FOR FILING TRANSCRIPT—PENDENCY OF PROCEEDING—RULE OF SUPREME COURT.**—A proceeding is pending for the settlement of a bill of exceptions, within the meaning of rule II of the supreme court relating to the time of filing the transcript on appeal from a judgment, where an appeal has been taken from an order relieving a party moving for a new trial from his omission to serve his notice of intention within the time prescribed by law, regardless of the ultimate success or failure of the proceeding. (*Union Collection Company v. Oliver*, 318.)
15. **CONFLICTING EVIDENCE—REVIEW ON APPEAL.**—Where upon some of the main points the evidence is conflicting, and nothing appears upon the face of the testimony from which the findings must have been reached indicating the improbability of its verity, an appellate court, upon a review of the case, must abide by the decision of the trial court upon the ultimate result arrived at by it from such testimony. (*Nahl v. Alta Irrigation District*, 333.)
16. **ORDER SUSTAINING DEMURRER TO AMENDED COMPLAINT—WHETHER APPEALABLE.**—An order sustaining the defendant's demurrer to the plaintiff's amended complaint is not appealable. The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from the order sustaining the demurrer, that the plaintiff could appeal. (*Baldwin v. Walls*, 349.)
17. **FAILURE OF RESPONDENT TO FILE BRIEF—ACCEPTANCE OF RECORD AS PRESENTED BY APPELLANT.**—Where an appeal is taken under section 953a of the Code of Civil Procedure, and the appellant, pursuant to the requirements of section 953c of the Code of Civil Procedure, prints in his brief such parts of the record as he deems pertinent to the questions involved on the appeal, but the respondent files no brief and raises no question as to the correctness or sufficiency of the record as presented by the appellant, the appellate court will accept the evidence as set out in the appellant's brief as true and correct. (*Beckett v. Stuart*, 373.)
18. **MOOT QUESTION—IMPROVEMENT BONDS—REFUSAL TO ENJOIN ISSUANCE.**—An appeal from an order dissolving an injunction against the issuance of improvement bonds on the ground of their invalidity will be dismissed, where pending the appeal the bonds are issued, since a decision would have no binding authority and would not affect the legal rights of the parties. (*Bernard v. Weaver*, 532.)
19. **PRESUMPTION OF ISSUANCE OF BONDS—PENDENCY OF APPEAL.**—In such case where the complaint alleges that the city treasurer will, unless restrained, immediately issue the bonds, the appellate court will accept this allegation as true and assume that he has performed the duty imposed upon him by law, and that therefore the bonds were issued upon the dissolution of the injunction and during the pendency of the appeal. (*Id.*)

APPEAL (Continued).

20. **DECISION ON MERITS—JUDGMENT FOR COSTS.**—In such case the appellants cannot insist upon a decision upon the merits by reason of the fact that a judgment for costs was rendered against them, where it appears from the record that no judgment for costs in any sum was rendered, it being recited therein that defendant recover costs of suit amounting to the sum of dollars. (Id.)
21. **SUBSEQUENT ORDER OF TRIAL COURT CONSOLIDATING ACTIONS—WHETHER ABROGATES APPEAL.**—An appeal from an order setting aside a default judgment is not abrogated by a subsequent order of the trial court consolidating the action with others pending in such court. (*Durbrow v. Chesley*, 627.)
22. **TAKING OF APPEAL—EFFECT AS DEPRIVING TRIAL COURT OF JURISDICTION.**—After the taking and perfecting of an appeal to the supreme or appellate courts from a judgment or an order rendered or made by the superior court, the latter tribunal loses jurisdiction to make any order or to carry out any proceedings in the action which would have the effect of vitiating the appeal or preventing the review of all alleged errors brought up by a duly prepared and authenticated record. (Id.)
23. **TRANSFER BY BOTH PARTIES TO THIRD PERSONS OF PROPERTY IN LITIGATION—DISMISSAL OF APPEAL.**—Where an appeal is taken from an order vacating a default judgment in an action of ejectment, and thereafter both of the parties transfer their respective interests in the property to a third person, the appeal will be dismissed. (*Wilson v. Chesley*, 630.)
24. **COSTS—RETENTION OF APPEAL TO DETERMINE.**—The court will not retain the appeal and decide alleged errors merely for the purpose of determining who is to pay, and who is entitled to receive, the costs on appeal, which are alone in issue. But as it appears from the record that the trial court abused its discretion in making the order from which the appeal is taken, the costs on appeal should be shared equally between the parties and not all placed on the appellant. (Id.)
25. **INTENDMENTS IN SUPPORT OF JUDGMENT AND FINDINGS.**—Not only are all intendments on appeal in favor of the regularity of the action of the trial court, but the findings of fact made by the trial court are to receive such a construction as will uphold rather than defeat its judgment thereon. (*Pacific States Corporation v. Arnold*, 672.)
26. **AUTHENTICATION OF TRANSCRIPT—ABSENCE OF JUDGE'S CERTIFICATE.** A transcript on appeal from an order granting a motion for a new trial which contains no certificate of the judge that the papers and records included in the transcript are any or all of those used upon the hearing of the motion, is insufficient under either the old or new method of perfecting and presenting the record on

APPEAL (Continued).

appeal, although the transcript has attached to it the certificate of the clerk that the papers and orders therein contained are true copies of the originals on file in his office. (*Russell v. Chisholm*, 727.)

27. **APPEAL IN JUSTICE'S COURT—UNDERTAKING—FAILURE OF SURETIES TO JUSTIFY—NEW BOND.**—An appeal in a justice's court action is not perfected and will be dismissed, where the sureties on the undertaking fail to justify within five days after service of notice of exception to their sufficiency; and the furnishing by the appellant on the last day for justification of a new bond with a single corporation surety, which does not justify, in lieu of the individual sureties on the excepted undertaking, will be unavailing to save the appeal. (*Keefe v. Superior Court*, 750.)
28. **CORPORATION AS SURETY—NECESSITY OF JUSTIFICATION.**—Corporations authorized by the provisions of section 1056 of the Code of Civil Procedure to act as sureties on undertakings in judicial proceedings, are subject to the same requirement as to justification as are persons who execute similar undertakings. (*Id.*)
29. **UNDERTAKING ON APPEAL—ONE OF APPELLANTS AS SURETY.**—Where the defendants in an action in a justice's court are husband and wife, and on appeal both are named as appellants in the notice and undertaking, the wife cannot act as surety, although it is asserted that she is not interested in the judgment. (*Id.*)
30. **ORDER REFUSING TO DISSOLVE ATTACHMENT—GROUNDS OF MOTION NOT DISCLOSED BY RECORD.**—An order denying a motion to dissolve a writ of attachment will be affirmed on appeal, where the grounds upon which the motion was made are not disclosed by the record. An appellate court cannot assume error in the rulings of the trial court; error must affirmatively appear from the record, otherwise the judgment will be affirmed. (*Costa v. Raza*, 754.)

See Corporations, 10; Criminal Law, 1, 2, 9, 66, 68, 110, 130, 133, 135; Divorce, 2, 5, 8, 12-14; Evidence, 2, 12, 15; Guaranty, 5; Holiday; Husband and Wife, 4; Judgment, 6; Mortgage; New Trial, 1, 8.

APPROPRIATION. See Water and Water-rights, 5-12, 16-18.

ARSON. See Criminal Law, 10, 11.

ASSESSMENT. See Drainage District; Street Assessment.

ASSIGNMENT. See Guaranty, 2, 3; Landlord and Tenant, 4, 9; Pleading, 7.

ATTACHMENT.

1. **AFFIDAVIT—AMENDMENT BY ATTORNEY.**—Under sections 538 and 558 of the Code of Civil Procedure, an amended affidavit in attach-

ATTACHMENT (Continued).

- ment proceedings, as well as the original affidavit, can be made for the plaintiff by his attorney. (*Nichols v. Davis*, 67.)
2. **AMENDMENT OF AFFIDAVIT—WHEN ALLOWABLE.**—Under section 558 of the Code of Civil Procedure the attaching party may, by amendment, supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof. (*Id.*)
 3. **ACTION AGAINST TWO DEFENDANTS—AMENDMENT OF AFFIDAVIT TO SHOW.**—An affidavit on attachment in an action against two defendants, which recites that the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the "said defendant," may be amended under section 558 of the Code of Civil Procedure by changing "defendant" to "defendants," and adding thereafter the words "or of either of them." (*Id.*)
 4. **AMENDMENT OF AFFIDAVIT—DESCRIPTION OF CONTRACTS.**—A statement in the affidavit that the defendants are indebted to the plaintiff upon seven express contracts for the direct payment of money in this state, and that payment of the same has not been secured, may be amended so as to describe the contracts, which consist of seven promissory notes, by reference to the complaint, and adding "that the payment of the same and each of them and each part of them has not been secured," etc. (*Id.*)
 5. **CONSTRUCTION OF AFFIDAVIT—SECURITY FOR NOTES.**—The affidavit, as thus amended, is not subject to the criticism that from aught that appears from the affidavit the payment of some of the promissory notes has been secured. The affidavit plainly enough states that such contracts have not been secured, nor has either of them nor any part thereof been secured. (*Id.*)
 6. **NEGATIVE PREGNANT—INTERPRETATION OF AFFIDAVIT.**—The rule with regard to a negative pregnant, as also an affirmative pregnant, has reference more particularly to a pleading, which must not be ambiguous. An affidavit in an attachment is not strictly a pleading, but is more a matter of evidence, and is to be given a fair and reasonable construction in arriving at its meaning. (*Id.*)

See Appeal, 30; Garnishment; Vessels, 1.

AUTOMOBILE. See Negligence, 1-13.

BALLOT. See Election.

BANKS.

1. **BANKS AND BANKING—CERTIFICATE OF DEPOSIT—RELATION BETWEEN PARTIES.**—A certificate of deposit is substantially a simple receipt

BANKS (Continued).

of a bank, negotiable in form, for a certain sum of money; it creates no trust relation between the depositor and the bank, but merely the relation of debtor and creditor. (*People v. California Safe Deposit and Trust Company*, 199.)

2. **CERTIFICATE OF DEPOSIT—AMOUNT OF NOT A SPECIAL DEPOSIT.**—Where attorneys receive a check from a client with instructions to obtain payment thereof, pay certain claims, and forward the balance to her, and they deposit the check in a bank to the credit of their general account, and subsequently present their check on such account, drawn to the order of the bank, and the bank issues a certificate of deposit for the same amount payable to the client, and the attorneys forward the certificate to her, and thereafter the bank closes its doors and refuses payment of the certificate when presented, a special deposit or trust relation was not thus created in favor of the client, but the money involved continued to constitute a part of the general funds of the bank subject to claims of its creditors without any preference in her favor; there being nothing to show that the bank expressly or impliedly agreed to hold the money in trust for her or her assignee, or that it agreed to transmit the money to her. (*Id.*)
3. **GENERAL AND SPECIAL DEPOSITS DISTINGUISHED—INTENTION OF PARTIES.**—A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical coin or other article deposited. Whether a deposit is general or special depends upon the intention of the parties. A deposit will, however, always be deemed to be general, unless made special by agreement. And something more than the intent of one of the parties is necessary to make a deposit special; the intent of both parties must be shown to concur, either expressly or by implication. (*Id.*)

BILL OF EXCEPTIONS. See Appeal, 3-8, 14.

BIRTH CERTIFICATE. See Criminal Law, 26.

BROKERS.

1. **REAL ESTATE BROKERS—VALUE OF SERVICES—RATE FIXED BY BOARD OF BROKERS.**—In an action by a broker to recover the reasonable value of services in leasing real property, a resolution of the real estate board of brokers in the city, establishing a scale of commissions to be charged by brokers in negotiating leases, is admissible in evidence, and, together with positive and uncontradicted testimony of a witness that such rate is reasonable and customary, is sufficient to support a finding in favor of the plaintiff. (*W. B. McGerry & Company v. Marsicano*, 55.)

BROKERS (Continued).

2. **QUESTIONS OF FACT—CONCLUSIVENESS OF DETERMINATION BY TRIAL COURT.**—The power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling when substantial evidence exists to support its finding. (Id.)
3. **COMMISSION FOR EXCHANGE OF PROPERTIES—WHEN NOT EARNED.**—A broker who is employed to effect an exchange of real estate is not entitled to a commission if he does not produce a person ready and able to make an exchange in accordance with the proposed terms. (Dyar v. Stone, 143.)
4. **FAILURE TO EFFECT EXCHANGE—COMMISSION—BURDEN OF PROOF.**—Where no exchange is effected, the burden of proof is upon the broker to show that he found one who was ready, willing, and able to effect the exchange upon the terms proposed. (Id.)
5. **COMMISSION FOR SALE OF REAL ESTATE—PRODUCTION OF PURCHASER.**—A broker's contract for the sale of real estate is not performed, nor is his commission earned, until it affirmatively appears that he has procured and secured a purchaser ready, willing, and able to buy the property offered for sale upon the terms and conditions and at the price fixed by the owner. (Douglas v. Spangenberg, 294.)
6. **COMMISSION—WHAT MUST BE DONE IN ORDER TO EARN.**—Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser an enforceable contract binding him to purchase the property offered for sale at the price and upon the terms specified by the owner or assented to by him; or, in the absence of such a contract, by proof of the fact that the broker brought the owner and prospective purchaser together for the purpose of consummating a contract of sale at the price and upon the terms proposed or assented to by the owner, and that the owner declined to proceed with the sale upon such terms. (Id.)
7. **ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.**—In this action by a broker against his principal for commissions alleged to have been earned in procuring a purchaser for real estate, the evidence fails to show that the broker procured a purchaser who was ready, able, and willing to buy upon the terms originally authorized by the principal, or upon other and different terms proposed by the broker and subsequently accepted and ratified by the principal. (Id.)
8. **LEASE OF REAL ESTATE—RIGHT TO COMMISSION.**—Under a contract providing that if a certain company "or any concern represented by" a designated person leases a building to be erected by the lessor, the lessor will pay a firm of real estate brokers a commission for services rendered in making the lease, the commission is earned upon the execution of a lease to lessees produced and pre-

BROKERS (Continued).

sented by such person irrespective of whether he has power to bind them. (Tucker, Lynch & Coldwell v. Hawley, 460.)

9. **BRINGING MINDS OF PARTIES TOGETHER—WHETHER NECESSARY.**—Under such agreement it is unnecessary for the broker to bring the minds of the lessor and lessee together, and thus become the procuring cause of the execution of the lease. The agreement contemplates that the parties to the lease shall arrive at its terms themselves. (Id.)
10. **FORMATION OF CORPORATION BY LESSOR—EFFECT ON BROKER'S RIGHT TO COMMISSION.**—The right of the broker to commissions under such contract is not affected by the fact that the building was erected by a corporation instead of by the lessor personally, as provided in the contract, the corporation having been formed for that purpose by the lessor, because of his lack of funds, and he being the owner of a large proportion of the stock. (Id.)
11. **CONTRACT TO PROCURE LESSEE—PAROL EVIDENCE TO VARY—COMMISSIONS.**—In an action by a real estate broker to recover commissions on a contract employing him to procure a purchaser or lessee for certain property, testimony tending to show the agreement to have been that the plaintiff's right to commissions was to accrue only in case a lease of the property was made by the defendant and then that such commissions were to be paid out of the first money received from the lessee, is improperly received as being an attempt to vary the terms of the written contract, where the phraseology of the contract contains no suggestion of any such conditions, and there is no room for the claim that the language therein used is ambiguous or indefinite in any of the particulars referred to, and the defendant makes no claim of excusable mistake. (Diamond v. Fay, 566.)
12. **FINANCIAL ABILITY OF PROPOSED LESSEE—REFUSAL OF LESSOR TO EXECUTE LEASE.**—But error in the admission of such testimony is nonprejudicial, if it is found upon the entire evidence adduced that the tenant proposed by the broker did not produce satisfactory evidence of his financial ability to respond to the obligations of the proposed lease, and for that reason the owner refused to accept him as a lessee. (Id.)
13. **CONTRACT TO PROCURE LESSEE—WHEN FULFILLED.**—The engagement of a real estate broker who proposes to secure a tenant for an owner of real property is, that he will present a satisfactory person who is ready, able, and willing to enter into such a lease as is proposed to be made by the owner. (Id.)

See Corporations, 1-3.

BUILDING CONTRACT.

IMPERFECT PERFORMANCE—RIGHT OF CONTRACTOR TO RECOVER DAMAGES FOR BREACH.—Where a building contractor put in a foundation which was defective in a substantial respect, and for that reason the owners refused to permit him to proceed with the work, he cannot recover damages for breach of the contract, although he contemplated putting in a new foundation, but did not because he received no assurance, in addition to that afforded by the original contract, that the second foundation would be accepted. (*Norman v. Hall*, 25.)

BURGLARY. See Criminal Law, 12-23.

CANCELLATION. See Promissory Note.

CARTWRIGHT ACT. See Monopolies.

CERTIFICATE OF DEPOSIT. See Banks.

CERTIORARI. See Municipal Corporation, 2.

CLAIM AND DELIVERY. See Judgment, 3.

COMBINATIONS. See Monopolies.

COMMON CARRIERS. See Negligence, 22-42.

COMMON COURTS. See Pleading, 5.

COMMUNITY PROPERTY. See Divorce, 2-4.

CONSTITUTIONAL LAW. See Criminal Law, 110; Evidence, 10; Municipal Corporations, 5-10; University of California.

CONTEMPT. See Evidence, 11.

CONTINUANCE. See Practice, 5.

CONTRACT.

1. **PROMISE TO PAY MONEY — EXECUTED CONSIDERATION—ABANDONMENT OF WORK.**—Where a construction company promises, for value received, to pay a certain sum of money upon the completion of a water-plant and pipe-line which it has agreed to construct, it cannot, by abandonment of work on the water-plant, escape liability on its promise to pay the money. (*Taylor v. Simi Construction Company*, 308.)

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CONTRACT (Continued).

2. **CONTRACT TO FURNISH REFUSE OF FACTORY FOR FUEL—ACTION FOR BREACH—EVIDENCE.**—In this action by an electric company against the owner of a box factory for damages because of an alleged breach of a contract to furnish the electric company for fuel purposes the excess of the refuse of the box factory not needed by it for steam generating purposes, the finding that the defendant did not refuse to permit the plaintiff to use such refuse is supported by the evidence. (*Loyalton Electric Light Company v. California Pine Box and Lumber Company*, 358.)
3. **CONSTRUCTION OF CONTRACT—OPERATION OF FACTORY.**—Such contract does not obligate the owner of the box factory to operate it merely for the sake of producing refuse which the electric company may use for fuel. (*Id.*)

See Building Contract; Corporations, 16, 17; Damages; Interest; Mistake; Sale; Specific Performance; Wills, 7-11.

CONVERSION.

COLLECTION OF NOTE AND APPROPRIATION OF PROCEEDS—DEFENSE—FINDINGS.—In an action to recover the amount of a note and mortgage intrusted to the defendant for collection, and alleged to have been collected and fraudulently appropriated by him to his own use, the failure to find on an issue tendered by the answer and constituting a defense to the action, that the plaintiff, for a valuable consideration, sold and transferred the note to the defendant, is ground for a reversal of a judgment for the plaintiff. (*Beckett v. Stuart*, 373.)

CORPORATIONS.

1. **AUTHORITY OF MANAGER—EMPLOYMENT OF BROKER.**—A general manager of a corporation has express authority to do those things only which are ordinarily customary and usual in the transaction of its business. He may have also ostensible authority to do other things which the corporation by a course of conduct may hold him out as being possessed of; but that condition is not shown in this case where a broker, in his suit against a corporation for a commission alleged to have been earned in procuring a purchaser of its stock and bonds, contends that the manager employed him for that purpose. (*Neuhart v. George K. Porter Company*, 526.)
2. **BROKER—PROCUREMENT OF OFFER—ACCEPTANCE BY PRINCIPAL.**—In this action by a broker against a corporation for a commission alleged to have been earned in procuring a purchaser for its stock and bonds, it is held that, conceding the manager of the corporation had authority to bind it in the matter of the sale of the stock and bonds, it did not, through such officer, accept the proposal made to it through the broker, the broker admitting that he was

CORPORATIONS (Continued).

not employed to obtain a purchaser at a price fixed but at such a price as would be satisfactory to his employer, and it not appearing that the broker ever obtained a binding contract from his proposed purchaser. (Id.)

3. **SALE OF BONDS—AFFIDAVIT OF SHOWING ACCEPTANCE.**—A mere recital in an affidavit, filed by the president of a corporation in an action to enjoin the sale of the stock and bonds in question, that an offer of two hundred thousand dollars had been obtained for them which it was desirable to accept, does not bind the corporation as an acceptance of the offer of the broker's client. (Id.)
4. **MISAPPROPRIATION BY DIRECTOR—NATURE OF LIABILITY THEREFOR—SURVIVORSHIP OF ACTION.**—The liability of a director of a corporation to its stockholders and creditors for the embezzlement and misappropriation of its funds is contractual, not penal in its nature, and a cause of action to enforce it survives his death and may be prosecuted against his administrator. (Major v. Walker, 465.)
5. **DEATH OF DEFENDANT—SUBSTITUTION OF ADMINISTRATOR.**—When an action has been brought against a director of a corporation for an embezzlement and misappropriation of its funds, it is error, after his death, to dismiss the action and to vacate a previous order substituting the administrator of his estate as party defendant. (Id.)
6. **FOREIGN CORPORATION—FAILURE TO FILE ARTICLES OF INCORPORATION—RIGHT TO DEFEND ACTION.**—The failure of a foreign corporation doing business in this state to file a certified copy of its articles of incorporation in the office of the secretary of state, as required by sections 408 and 409 of the Civil Code, renders it subject to a fine, and deprives it of the right to maintain any action in any of the courts of this state, but does not prevent it from defending any such action brought against it. (Winston v. Idaho Hardwood Company, 211.)
7. **DESIGNATION OF PERSON ON WHOM TO SERVE PROCESS—TIME FOR FILING.**—Such corporation is not required to file a designation of some person residing in this state upon whom process may be served, as provided by section 405 of the Civil Code, until the time of the filing of a certified copy of its articles of incorporation in the office of the secretary of state, and in the absence of proof of the filing of such a certified copy, such time has not arrived and no duty devolves upon it to file such designation. (Id.)
8. **SERVICE OF SUMMONS ON SECRETARY OF STATE.**—In an action against such corporation service of summons on the secretary of state is unauthorized, if it is not alleged in the complaint or otherwise shown that the defendant has failed to comply with the provisions of sections 408 and 409 of the Civil Code requiring such a corporation

CORPORATIONS (Continued).

- to file a certified copy of its articles of incorporation in the office of the secretary of state, but it is simply recited in the return of service of the summons that the defendant has not designated any person residing in the state upon whom process can be served. (Id.)
9. **DEFAULT JUDGMENT POWER OF CLERK TO ENTER.**—In such case the clerk of the court is without authority to enter a judgment by default against the corporation. (Id.)
10. **APPEAL—DENIAL OF MOTION TO DISMISS.**—A motion to dismiss an appeal from such judgment, on the ground of failure to file a copy of the articles of incorporation and a designation of some person on whom to serve process, is properly denied. (Id.)
11. **FAILURE TO FILE ARTICLES OR DESIGNATE PERSON ON WHOM TO SERVE PROCESS.**—The failure to file a copy of its articles of incorporation, as required by sections 408 and 409, renders a foreign corporation subject to the penalties imposed by the provisions of section 410, but the denial of the right of such corporation to defend an action, as provided in section 406, attaches only when it fails to designate an agent in the state upon whom service may be made, and the duty of filing such designation arises only at the time of filing the copy of the articles of incorporation, which in this case was never filed. (Id.)
12. **FOREIGN CORPORATION—SERVICE OF SUMMONS—"DOING BUSINESS" IN STATE AS PREREQUISITE TO JURISDICTION.**—Under section 411 of the Code of Civil Procedure it is requisite, in order that a court may acquire jurisdiction over a foreign corporation, that the corporation shall be "doing business" within the state at the time summons is served; and if the proof of an alleged service of summons does not make such a showing, the court is justified in refusing to enter judgment against the corporation. (Carpenter v. Bradford, 560.)
13. **LICENSE—FORFEITURE ON FAILURE TO PAY—ACTION TO COMPEL REISSUANCE OF STOCK—PARTIES.**—A foreign corporation which has forfeited its right to do business in the state by failing to pay the license-tax, is not a proper party defendant to an action, brought by one who has acquired shares therein since such forfeiture, to compel the reissuance of stock. Such action can be maintained, if at all, only against the directors as trustees of the corporation. (Id.)
14. **PURCHASER OF STOCK—RIGHT TO COMPEL REISSUANCE.**—The directors of a foreign corporation which, through failure to pay the license-tax, has forfeited its right to do business in the state, cannot be compelled to reissue stock to one who, at an execution sale subsequent to such forfeiture, purchased the shares belonging to and standing in the name of the judgment debtor. (Id.)

CORPORATIONS (Continued).

15. **REMEDY OF PURCHASER—ACCOUNTING—PARTICIPATION IN ASSETS OF CORPORATION.**—But it does not follow that such purchaser is without remedy; if he has succeeded to the interest of one of the stockholders, he is entitled to an accounting and to participate in any distribution of the assets of the corporation. (Id.)
16. **SALE OF ENTIRE ASSETS—RATIFICATION OF TRANSACTION.**—A contract to sell all the assets of a corporation cannot be repudiated on the ground that the delegation of authority of the president and secretary of the company to make the sale was void, if thereafter both parties assume and act upon the contract as though its validity were without question, and the directors pass a resolution expressly ratifying the sale and tender a deed of the property to the purchaser. (*Waratah Oil Co. v. Reward Oil Co.*, 638.)
17. **RATIFICATION OF CONTRACT—CONSENT OR REPUDIATION.**—Such contract may be ratified by the corporation without the consent of the purchaser, and before he repudiates it. (Id.)
18. **SPECIAL DIRECTORS' MEETING—NOTICE—SPECIFYING OBJECT OF MEETING.**—A notice of a special meeting of directors need not specify the object of the meeting. (Id.)
19. **SUBSCRIPTION. AGREEMENT FOR STOCK IN PROPOSED COMPANY—ACTION TO RECOVER UNPAID BALANCE THEREON.**—Where one enters into a subscription agreement with respect to a proposed corporation, agreeing to pay his subscription on demand of the board of directors, and accepts the stock and pays part of the subscription price, having knowledge that the corporation is not formed by the same persons who signed the subscription agreement, and admitting that the corporation thus formed is the one contemplated by the agreement, the corporation may recover from him the unpaid balance due on his stock, without pleading the subscription agreement as the basis for the action. (*Ferrochem Company of Pennsylvania v. Danziger*, 584.)
20. **IRREGULARITY IN ISSUANCE OF STOCK CERTIFICATE—WHETHER DEFENSE TO ACTION ON SUBSCRIPTION.**—The defendant in such action is not excused from paying for his shares of stock, as required by the contract, because the certificate issued to him does not comply with the requirements of section 323 of the Civil Code. (Id.)
21. **STOCKHOLDERS' LIABILITY — CREDITOR'S SUIT — CONDITIONS PRECEDENT.**—Where it appears from the allegations of the complaint in an action by a judgment creditor to reach unpaid subscriptions to corporate stock, that the corporation is wholly insolvent and without any assets other than those which the judgment creditor has made a futile attempt to reach by execution, he has done all that he should be required to do as a condition precedent to maintaining the action. (*Merchants' Mutual Adjusting Agency v. Davidson*, 274.)

CORPORATIONS (Continued).

22. RETURN OF EXECUTION *NULLA BONA*—WHEN UNNECESSARY.—The return of an execution *nulla bona* is not a prerequisite to maintaining an action of this character, where the complaint shows that the corporation is wholly insolvent and has no assets upon which to levy an execution. (Id.)
23. ISSUANCE OF STOCK AS PAID-UP—EFFECT OF AGREEMENT TO SUCH EFFECT.—The evidence in this case does not establish an agreement whereby the shares were sold and the certificates issued to the defendant stockholder as "paid up" stock; but conceding such agreement, if made, binding upon the corporation, it could not affect the rights of the plaintiff as a judgment creditor of the insolvent corporation to enforce payment to it of the full par value of the stock less the price actually paid therefor. This is upon the doctrine of the so-called trust fund theory. (Id.)
24. INSOLVENT CORPORATION—TRUST FUND THEORY.—The assets of an insolvent corporation, in whatever form, are held in trust for its creditors. Among such assets are unpaid balances consisting of the difference between the par value of the stock and the amount actually paid therefor by the purchaser from the corporation, as to the payment of which, so far as the creditor is concerned, the obligation is unconditional, even though the corporation has, in selling the stock, accepted a qualified liability whereby it is estopped from enforcing payment of the balance. (Id.)
25. FINANCIAL EMBARRASSMENT OF CORPORATION—SALE OF STOCK TO RELIEVE.—The rights of a creditor of the insolvent corporation are not affected by the fact that the corporation, when it sold the stock, was in financial straits, and made the sale in good faith to relieve its embarrassment. (Id.)

See Appeal, 28; Brokers, 10; Guaranty, 1, 4; Municipal Corporations; Negligence, 2.

COSTS.

1. NECESSITY OF STATUTORY PROVISION FOR ALLOWANCE.—The right to recover costs is a matter of statutory regulation, and, in the absence of a statute, no costs can be recovered by either party. (Kummeth v. Atkisson, 401.)
2. MANDAMUS IN APPELLATE COURT—COSTS OF TAKING DEPOSITION.—Sections 1022 and 1033 of the Code of Civil Procedure authorize the recovery of costs in an original proceeding in an appellate court for a writ of mandate; and the expense of taking a deposition, if necessarily and legally incurred, is within the contemplation of such sections. (Id.)
3. DEPOSITION TAKEN PRIOR TO APPEARANCE BY RESPONDENT.—But where depositions in such a proceeding are taken on behalf of the respondent prior to his appearance and the presentation therein

COSTS (Continued).

of any issue of law or of fact, the expense of taking them is not properly chargeable against the petitioner on the denial of the writ, under section 2021 of the Code of Civil Procedure providing that the testimony of a witness may be taken by deposition "in a special proceeding after a question of fact has arisen therein." (Id.)

4. **CONTESTING CORRECTNESS OF CHARGES—BURDEN OF PROOF.**—While it is true that the filing of a verified memorandum of costs establishes the correctness of the charges therein made which *prima facie* appear to be necessary and proper, nevertheless when the correctness of the memorandum is challenged, either in whole or in part, by the affidavit or other evidence of the contesting party, the burden is then upon the party claiming the costs to show by competent and satisfactory evidence that the items charged were for matters and things necessarily relevant and material to the issues involved in the action. (Whitaker v. Moran, 758.)
5. **MOTION TO TAX COST OF DEPOSITION—AFFIDAVIT ATTACKING RELEVANCY AND MATERIALITY—REBUTTAL EVIDENCE.**—It is improper to allow costs charged for taking depositions, where the depositions are not offered nor considered in evidence on the hearing of the motion to tax costs, and the only showing made in opposition to the affidavit of the party attacking such items on the ground of irrelevancy and immateriality, is an unverified statement concerning the particulars of the costs charged. (Id.)
6. **DISMISSAL OF ACTION—WITNESS FEES.**—As a general rule, when a plaintiff voluntarily dismisses his action, the defendant will be entitled to his necessary costs; and the mere fact that the testimony of a witness was rendered unnecessary by a dismissal of the action will not operate to deprive the defendant of the expense necessarily incurred in good faith, and within the limit of the fees prescribed by law, to secure the attendance of the witness. (Id.)
7. **COSTS OF CERTIFIED COPIES OF DOCUMENTS—ALLOWANCE ON MOTION—PRESUMPTION ON APPEAL.**—The allowance by the trial court of costs for procuring certified copies of documents, on motion, where the documents are submitted to the court, will be assumed to be justified on appeal, when the documents are not set forth in the bill of exceptions, notwithstanding their validity, necessity, and materiality of the documents as evidentiary matters were controverted on the motion by affidavits of the opposing party. (Id.)

See Appeal, 20, 24; Damages, 2; Divorce, 12.

COURTS.

See Justice's Court; Juvenile Court.

CREDITOR'S SUIT.

See Corporations, 21—25.

CRIMINAL LAW.

1. **APPEAL—NONAPPEALABLE ORDERS.**—No appeal lies from a motion in arrest of judgment, or from the verdict, or from an order suspending judgment and placing the defendant on probation. (*People v. Hartman*, 72.)
2. **ORDER DENYING NEW TRIAL—WHETHER APPEALABLE.**—The word "order," in section 1247 of the Penal Code providing for the making of the record upon appeal from "any judgment or order" in a criminal proceeding, is not restricted to an order made after judgment, but the language of the section is broad enough to include an order refusing the defendant a new trial before judgment, notwithstanding the provisions of section 1239 allowing an appeal from "any order made after judgment," especially in view of section 1237 expressly giving the right of appeal from an order denying a motion for a new trial. (*Id.*)
3. **SEARCH WARRANT—PROHIBITION AFTER EXECUTION OF WARRANT.**—A writ of prohibition will not issue to restrain the execution of a search warrant where, before the issuance of the alternative writ, the search warrant has been executed and the property taken into the possession of the magistrate, and no showing is made of any further attempted judicial action on his part. (*Ryan v. Crist*, 744.)
4. **INDICTMENT—PURPOSE OF PLEADING PARTICULARS.**—Primarily the purpose of precision in pleading the particulars of a crime is to preclude the possibility of a second prosecution for the same act, and at the same time to inform the defendant with reasonable certainty of that which he will be called upon to meet and defend against upon the trial. (*People v. Guaragna*, 120.)
5. **ABORTION—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF INSTRUMENTS AND MANNER OF THEIR USE.**—An information charging an abortion is not insufficient because of failure to allege by name or description the character of the instruments alleged to have been employed, or of failure to specify the manner in which the instruments were used, where the doing of every act essential to the commission of the crime is alleged in the language of the statute, and it is specifically charged that the crime was committed by the use of "instruments in and about and within the body" of the alleged victim. (*Id.*)
6. **ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO REPUTATION OF ACCUSED.**—In a prosecution for abortion it is not misconduct for the district attorney in his argument to the jury to state that the evidence discloses that the defendant is generally reputed to be a professional abortionist, where positive testimony to that effect has been developed by counsel for the defendant upon cross-examination of the people's witnesses. (*Id.*)

CRIMINAL LAW (Continued).

7. **INSTRUCTION—REFUSAL BECAUSE COVERED BY OTHERS.**—It is not error to refuse to instruct the jury that they should acquit the defendant if they find that the abortion charged was produced by means of drugs, and not, as alleged in the information, by the use of instruments, where the subject matter of such instruction is completely and correctly covered in the charge of the court. (Id.)
8. **EVIDENCE—SUFFICIENCY TO CONVICT OF ABORTION.**—In this prosecution for abortion the evidence, direct, circumstantial, and opinion, is amply sufficient to justify the finding of the jury implied from the verdict that the defendant, by means of instruments of some kind, committed the crime charged. (Id.)
9. **EVIDENCE—GENERAL ASSIGNMENT OF ERROR—REVIEW ON APPEAL.**—Where some eighteen rulings upon the admission or rejection of evidence are generally assigned as error, and no particular point concerning any one of the rulings is discussed in the brief of the appellant, but the appellate court is merely referred to the pages and folios of the transcript where the objections and rulings are to be found, it will not examine and pass upon points thus presented (Id.)
10. **ARSON—BURNING INHABITED BUILDING IN NIGHT-TIME—BURDEN OF PROOF.**—In order to sustain a conviction, under the provision of section 454 of the Penal Code that "maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree," the burden is upon the prosecution affirmatively to show that at the time the fire was kindled there was some human being other than the accused actually within the building. (People v. Principe, 729.)
11. **PRESENCE OF HUMAN BEING—ABSENCE OF EVIDENCE—INSTRUCTIONS.**—In a prosecution for arson in burning an inhabited building in the night-time, it is error to instruct the jury that they may find the defendants guilty of either degree of the crime charged, where there is a total lack of any evidence that there was any human being in the building at the time the fire was kindled. (Id.)
12. **BURGLARY—SUFFICIENCY OF EVIDENCE.**—The evidence in this prosecution for burglary not only warrants but compels the conviction of the defendant. (People v. Stirgios, 48.)
13. **ADMISSIONS OF DEFENDANT—DURESS OR PROMISE OF REWARD.**—Certain incriminatory statements and admissions of the defendant are not shown to have been induced by duress and promise of reward, but the most that can be said is that the record shows a decided conflict in the evidence. (Id.)
14. **SPECIFIC INSTRUCTION TO JURY—NECESSITY FOR REQUEST.**—A charge to the jury is not open to attack on the ground that it fails specifically to cover a particular point in the case which the defend-

CRIMINAL LAW (Continued).

ant deems pertinent and material, if no request for such instruction has been made. (Id.)

15. **WITNESS—CROSS-EXAMINATION—ADMISSION OF CONVICTION OF FELONY.**—When a witness for the defendant in a criminal prosecution admits on cross-examination that he has been convicted of a felony by pleading guilty thereto, an objection to a question by the defendant calling for the reasons which induced the witness to plead guilty, is properly sustained. (Id.)
16. **BURGLARY—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.**—In this prosecution for burglary the fact that the defendant had the property in his possession shortly after it was stolen and made contradictory statements as to how he obtained it, together with his contradicted testimony as to his whereabouts at the time of the commission of the offense, not to mention other suspicious incidents, were sufficient to support a verdict of guilty. (*People v. Wing*, 50.)
17. **EVIDENCE—IDENTIFICATION OF STOLEN ARTICLES.**—The exhibits admitted in evidence on the trial were sufficiently identified as the property of the business concern burglarized; some of them being positively identified as having been taken from the store, and others being shown to be of a similar brand and make to those handled in the store burglarized. (Id.)
18. **MOTION FOR A NEW TRIAL—CONTINUANCE—DISCRETION OF COURT IN DENYING.**—The court committed no abuse of its discretion in denying the defendant's last application for a continuance of the hearing of his motion for a new trial, where it had already granted three continuances of the motion, the last of which took the matter up to within one day of the time which the court could have granted the defendant under the provisions of section 1191 of the Penal Code without nullifying the verdict. (Id.)
19. **BURGLARY—SUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION.**—In this prosecution for burglary of a room from which were taken wearing apparel, jewelry and other articles, evidence that shortly after the commission of the crime the defendant was found in possession of some of the stolen goods, together with other incriminating testimony, was sufficient to support the verdict of guilty. (*People v. Wing*, 53.)
20. **MISCONDUCT OF COURT IN ORDERING WITNESS INTO CUSTODY—REVIEW ON APPEAL.**—The defendant in such case cannot complain on appeal of the action of the trial court in ordering, in the presence of the jury, one of his witnesses into custody on a pending misdemeanor charge, thus discrediting the witness, if the defendant did not call such person as a witness, nor assign the action of the court as misconduct. (Id.)

CRIMINAL LAW (Continued).

21. **IMPROPER ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO PRIOR CONVICTION.**—The statement of the district attorney, in his argument to the jury, that the defendant was in the habit of getting burglaries committed, and had been convicted of a felony, was not prejudicial, if a prior conviction of the defendant was developed on his cross-examination, and the court was not requested to instruct the jury to disregard the remark. (Id.)
22. **BURGLARY—BREAKING AND ENTRY—INTENTION.**—One who breaks and enters a boat-house to obtain a place for his companion to rest is not guilty of burglary. (People v. Ostrander, 241.)
23. **NEW TRIAL—REVIEW OF ORDER GRANTING.**—Where a conviction for burglary is had on conflicting evidence, an order of the trial court granting a new trial will not be disturbed on appeal. (Id.)
24. **PROSECUTION FOR EMBEZZLEMENT—EVIDENCE OF PRIOR OFFENSES.**—Where the defendant in a prosecution for embezzlement admits having received the money, but contends that he has returned it to the complaining witness, it is prejudicial error to admit evidence of previous offenses committed by the defendant, similar to the one charged, to show his guilty intent in dealings with the complaining witness. (People v. King, 259.)
25. **EVIDENCE OF OTHER OFFENSES—WHETHER ADMISSIBLE IN CRIMINAL PROSECUTION.**—Proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence. But this general rule is subject to certain well-defined exceptions, one of which is that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing a guilty intent whenever in any given case the existence of such intent is material and either disputed or doubtful. (Id.)
26. **FILING FALSE BIRTH CERTIFICATE.**—A birth certificate is not an "instrument" within the meaning of the term as used in section 115 of the Penal Code, which makes it a felony to procure the filing or recording of a false or forged instrument in any public office of the state (People v. Fraser, 82.)
27. **RECORDING FALSE INSTRUMENT—MEANING OF "INSTRUMENT."**—The word "instrument" as used in section 115 of the Penal Code, is limited in its meaning and application to that class of instruments invariably referred to throughout our statutes. (Id.)
28. **DEFINITION OF WORD "INSTRUMENT."**—Generally the term "instrument" as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term "instrument" as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered

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by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty. (Id.)

29. **FORGERY—EVIDENCE OF CONDUCT AND TRANSACTIONS LEADING UP TO CRIME.**—Where it appears on a prosecution for forging travelers' checks that the defendant and his associate had acted in concert throughout a general scheme to relieve the complaining witness of whatever of value he possessed, including the checks, and to turn the latter into money by whatever criminal means might be required, the prosecuting witness may testify of a conversation which he had with the defendant's associate before the defendant appeared on the scene, and also of conversations and conduct after the defendant joined his associate and the complaining witness, before the acquisition and forgery of the checks, as to the laying of illegal bets on a horse race, in the course of which the complaining witness lost all his ready money. (*People v. Prather*, 721.)
30. **INDORSEMENT OF TRAVELER'S CHECK—INDICTMENT FOR FORGERY—VARIANCE.**—Where an information charges the forgery of "a certain indorsement" of a traveler's check, and the evidence shows that the forged signature was written, not on the back of the check, but on the face thereof at the place indicated as essential to its transfer, there is no variance between the information and the proof. (Id.)
31. **NEGOTIABLE INSTRUMENT—INDORSEMENT ON FACE.**—The writing of the name of the payee of a traveler's check on its face, at the place indicated thereon as essential to its transfer, constitutes an indorsement thereof within the intendment of section 3108 of the Civil Code. (Id.)
32. **FORGERY OF CHECK—SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTION.**—In this prosecution for the forgery of a check, it cannot be said that there is no evidence of knowledge on the part of the defendant of the spurious character of the check. The identity of denomination of the money found on his person with that by which the check was paid on the previous day is highly significant, and goes far to corroborate the testimony of the paying teller that the defendant is the man to whom he paid the money. And the defendant's denial of having money on his person, except a few cents, is also not without significance. (*People v. Hunt*, 770.)
33. **MISCONDUCT OF DISTRICT ATTORNEY—WHETHER PREJUDICIAL.**—Where a district attorney by his conduct surrounds a case with an atmosphere of adverse comment, remark, and running argument throughout a trial, or takes unfair advantage of the defendant by intimating to the jury something that is either not true or not capable of being proved in the manner attempted, such misconduct may become such serious error that it may be presumed to have caused prejudice against the defendant and to have prevented him

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from having a fair trial. But an isolated and comparatively unimportant imprudence in conduct, such as smiling incredulously at the testimony of the defendant concerning his alleged ill treatment while under arrest, has no such consequences. (*People v. Smith*, 382.)

34. **INCEST—SUFFICIENCY OF EVIDENCE—CORROBORATION OF TESTIMONY OF ACCOMPLICE.**—In this prosecution of a man for incest there is sufficient evidence to corroborate the testimony of the accomplice, his daughter, and to justify the verdict of guilty; it being admitted by him, as well as shown by her testimony, that they occupied the same apartments at a hotel for several weeks, and there being evidence that he registered them at the hotel as husband and wife and introduced her to others as his wife. (*Id.*)
35. **LARCENY—THEFT OF DEED BY GRANTEE—INDICTMENT.**—An indictment charging the grantee named in a deed with grand larceny in stealing and carrying away the deed, which, if properly delivered, was sufficient to convey the title to the property described therein, and alleging the value of the property but not the value of the deed, is demurrable. (*People v. Dadmun*, 290.)
36. **THEFT OF INSTRUMENT OR DOCUMENT—SECTION 492 OF PENAL CODE.** Section 492 of the Penal Code, providing that "if the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen," does not purport to define any offense, but merely prescribes a rule of evidence for ascertaining and fixing the value of the article stolen. (*Id.*)
37. **MEANING OF "WRITTEN INSTRUMENT"—NECESSITY OF DELIVERY.**—The term "written instrument" means a written document, delivered with the intention that it shall take effect in accordance with its purpose as shown by the language used therein; the use of the word with respect to contracts and deeds of conveyance of real estate implies a delivery, without which the document is inoperative for any purpose. (*Id.*)
38. **UNDELIVERED DEED—WHETHER A SUBJECT OF LARCENY.**—An undelivered deed is not a "written instrument" within the meaning of section 492 of the Penal Code, and is not a subject of larceny. (*Id.*)
39. **LARCENY AND OBTAINING MONEY BY FALSE PRETENSES DISTINGUISHED.**—In larceny there is no parting with the title to the thing taken, nor intent to part with it, while in false pretenses the person defrauded intends that title shall be divested, but his consent is obtained by fraud. (*People v. Rial*, 713.)

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40. **CONFIDENCE GAME—FAKE RACES—OBTAINING MONEY TO BET.**—Where confidence men fit up a fake pool room and there accept money, a draft and a certificate of deposit from a victim, he intending that it shall be bet on races, and they intending to deprive him of it, without making any *bona fide* bets, the offense is larceny rather than obtaining money under false pretenses. (Id.)
41. **INTENT OF OWNER OF PROPERTY—EVIDENCE.**—The writing contained in and the indorsements made upon the draft and certificate of deposit do not constitute the only evidence from which the intent of the owner should be ascertained. (Id.)
42. **APPROPRIATION OF MONEY TO SOME USE.—WHETHER NECESSARY TO COMPLETION OF CRIME.**—In establishing the commission of the crime, it is not necessary that it should be shown that the property taken was applied to some use by the defendant or his confederates. When possession of the property was obtained through the fraudulent means employed and with intent to deprive the owner thereof, the crime was complete; and the fact that the complaining witness stopped payment on the certificate of deposit after delivery, did not make the act of obtaining possession thereof any the less criminal. (Id.)
43. **CORROBORATIVE PROOF—NECESSITY.**—The prosecution for such offense being one for larceny, it is not necessary that corroborative proof of the kind indicated by the provisions of section 1110 of the Penal Code should be furnished. (Id.)
44. **OTHER SIMILAR OFFENSES—ADMISSIBILITY OF EVIDENCE.**—In such prosecution evidence which tends to show that the defendant has, at prior times, engaged in practices similar to the offense complained of, is properly admitted. (Id.)
45. **SECONDARY EVIDENCE—PAROL TO SHOW CONTENTS OF DRAFT AND CERTIFICATE OF DEPOSIT.**—On the trial for such offense the prosecution need not demand of the defendant the production of the draft and certificate of deposit before offering parol evidence of their contents. (Id.)
46. **DEMAND OF DEFENDANT TO PRODUCE DOCUMENTS—ERROR INVITED.**—If the defendant objects to such testimony as secondary and incompetent, and thereby prompts the district attorney to demand that the defendant produce the documents, the defendant is not in a position to claim prejudice on account of such demand. (Id.)
47. **SCOPE OF EVIDENCE—WHETHER CIRCUMSCRIBED BY OPENING STATEMENT.**—The limit of evidence material to sustain the charge was not circumscribed by the opening statement of the district attorney, especially where the defendant could not have been misled to his prejudice as to the scope of the evidence designed to be produced against him. (Id.)

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48. HOMICIDE—SHOOTING POLICE OFFICER BY PERSON UNDER ARREST.—

Where a special policeman in plain clothes arrests a man on suspicion, without force or show of force, and without revealing his identity as a peace officer, and the prisoner, while walking with the officer to the jail, suddenly turns into an alley and shoots the officer, the killing is not justified nor reduced from murder to manslaughter. (*People v. Bradley*, 44.)

49. EVIDENCE—STATEMENT OF EYE WITNESS—TRANSCRIPT OF REPORTER'S NOTES.—If it is expressly stipulated at the trial for such homicide that the transcription of the shorthand notes of a statement, made to the district attorney in the presence of the defendant by an eye witness to the killing, may be read in evidence in lieu of the reporter testifying from his notes as to the interview, a motion thereafter to strike out the same as hearsay is properly denied. (*Id.*)50. MOTION TO STRIKE OUT EVIDENCE—NECESSITY OF PREVIOUS OBJECTION.—A motion to strike out evidence must be based upon an objection previously stated, if opportunity to object presented itself. (*Id.*)51. EVIDENCE—ACCUSATORY STATEMENTS MADE IN PRESENCE OF ACCUSED.—In a prosecution for homicide accusatory statements, made in the presence and hearing of the defendant by a person not called as a witness, are admissible in evidence for the single purpose of showing that the defendant's conduct in response to the accusation was not that of an innocent man, or that his statements in reply implicated him in the commission of the crime charged against him. (*Id.*)52. HOMICIDE—DEFENSE OF ALIBI—SUFFICIENCY OF EVIDENCE.—In this prosecution for homicide the evidence sustains the finding against the defendant on his claim of *alibi* and justifies the jury in concluding him to be the identical person who did the killing. (*People v. Kawasaki*, 92.)53. ALIBI—REFUSAL OF INSTRUCTIONS REGARDING.—The refusal to give an instruction requested by the defendant on the question of *alibi* is proper, when full and correct instructions have been given on the subject, and the one refused adds nothing to one which has been given at the defendant's request, and the court tells the jury over and over again that if they have a reasonable doubt of the defendant's guilt they must acquit him, and that the law deems it better that many guilty persons should escape rather than one innocent person be punished. (*Id.*)

54. IDENTITY OF ACCUSED—INSTRUCTIONS CAUTIONING JURY.—An instruction to "view with care most earnestly the testimony of those who testify to defendant's identity," is open to the objection that it is argumentative in form and directs special attention to one

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- particular feature of the testimony, thereby conveying the implication that the judge is distrustful of it. (Id.)
55. **EVIDENCE AS TO WHEREABOUTS OF ACCUSED AT TIME OF CRIME.**—If a witness testifies that he was at a theater with the defendant on the night of the homicide, it is proper to exclude questions as to when he heard of the crime, if counsel does not state that the purpose of the testimony is to show that the homicide was committed while the witness and the defendant were at the theater, and that they first learned of its commission on their return therefrom. (Id.)
56. **EXAMINATION OF WITNESS—COUNSEL TAKEN BY SURPRISE.**—Where counsel for the defendant is taken by surprise in questioning a witness, but does not take advantage of permission given by the court to examine the witness as to different statements made before the trial, and turns the witness over to the prosecution for cross-examination, and the prosecution, without objection, examines the witness as to such statements, counsel for the defendant cannot, on redirect examination, go into the matter, nor can he have the answers of the witness on cross-examination stricken out. (Id.)
57. **UNSATISFACTORY TESTIMONY—SURPRISE—RIGHT TO SHOW CONTRARY STATEMENTS ELSEWHERE.**—The mere failure of witnesses to give favorable testimony for the party producing them does not entitle him to prove that they have made contrary statements elsewhere. (Id.)
58. **REFUSAL OF NEW TRIAL—NEWLY DISCOVERED EVIDENCE—PRESUMPTION ON APPEAL.**—Applications for a new trial on the ground of newly discovered evidence are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised, where affidavits in the record are conflicting. (Id.)
59. **PRELIMINARY EXAMINATION—RIGHT TO COUNSEL.**—It is unnecessary for the magistrate at a preliminary examination to go through the formality of advising the accused of his right to counsel, when he has already employed an attorney who is present when the case is called. (People v. Stein, 108.)
60. **READING OF COMPLAINT TO ACCUSED—WHETHER MAY BE OMITTED.**—An information will not be set aside because the complaint was not read to the accused at the preliminary examination, where his attorney, who was present with him, waived the reading and announced a readiness to proceed with the examination. (Id.)
61. **INFORMING ACCUSED OF CHARGE AGAINST HIM—WHETHER COMPLAINT MUST BE ACTUALLY READ.**—The statute does not in terms declare that the complaint shall be read to the accused at the preliminary examination, but that the magistrate must inform him of the charge. (Id.)
62. **HOMICIDE—SHOOTING INTO CROWD—MALICE IMPLIED.**—Where one deliberately and unnecessarily shoots into a crowd of people, with

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an utter disregard of consequences, whereby human life is destroyed, malice is implied and the crime is murder, although he has no malice against any particular person in the crowd. (Id.)

63. PARTIAL INSANITY—RESPONSIBILITY OF ACCUSED—INSTRUCTIONS.—

It is not error to instruct the jury in a homicide case that, although the defendant, at the time he committed the act, was laboring under partial insanity, "if he still understood the nature and character of his act and its consequences, and had a knowledge that it was wrong and criminal, and he had mental power at the time sufficient to apply that knowledge, and to know if he committed the act he would be doing wrong, and receive punishment, and that he possessed a will sufficient to restrain the impulse he may have had to kill, arising from his diseased mind, then such partial insanity will not exempt him from responsibility, under the law, for such act, and you should find him guilty, in the degree shown by the evidence," provided the jury were convinced by the evidence beyond a reasonable doubt that the killing of the deceased by the defendant was without legal justification or legal excuse. (Id.)

64. VOLUNTARY INTOXICATION—RESPONSIBILITY OF ACCUSED—INSTRUCTIONS.—

Where the defense in a homicide case is insanity, partly superinduced by intoxicating liquors, and the prosecution claims that the accused was not insane but merely in a state of voluntary intoxication at the time of the offense, and considerable testimony is addressed to this feature of the case, it is proper to instruct the jury that "no act committed by a person in a state of voluntary intoxication is less criminal by reason of his having been in such condition, but that where the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, evidence of the intoxicated condition of the accused at the time of the committing the act is admissible and may be considered by the jury in determining the purpose, motive or intent with which he committed such act." (Id.)

65. DEFENSE OF INSANITY—INSTRUCTION CAUTIONING JURY.—

An instruction in which the court cautions the jury to examine with care the defense of insanity interposed by the defendant "lest an ingenious counterfeit of the malady furnish protection to the guilty," while open to criticism, is not ground for reversal. (Id.)

66. INSTRUCTIONS — GENERAL OBJECTION — REVIEW ON APPEAL.—

Where error is claimed in rulings of the trial court on instructions, it is the duty of the party complaining on appeal to point out the error, otherwise it will not be reviewed, as it is not incumbent on a reviewing court to search through the record for the purpose of discovering for itself wherein the action of the trial court in the respect complained of involves error prejudicial to the defendant. (Id.)

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67. **ARGUMENT OF DISTRICT ATTORNEY—WHETHER OBJECTIONABLE.**—Where the evidence in a homicide case shows that the defendant, while intoxicated, deliberately and without provocation, shot into a crowd, the district attorney is justified in stating in his argument to the jury that if there ever was a case in his experience wherein there was disclosed an “abandoned and malignant heart,” it is the case of this defendant. (Id.)
68. **MISCONDUCT IN ARGUMENT—OBJECTION—REVIEW ON APPEAL.**—Objectionable remarks by the district attorney in a criminal case will not be reviewed or considered on appeal, unless they have been objected to at the time they were made, so that the trial court might have been accorded an opportunity to counteract their effect upon the jury. (Id.)
69. **VERDICT—DELIVERY OF FORM TO JURY FIXING PLACE OF IMPRISONMENT.**—The delivery by the court to the jury in a homicide case of a form of verdict designating the place of imprisonment in case the defendant is found guilty, while improper, is not prejudicial as being suggestive. (Id.)
70. **NEW TRIAL ON THE GROUND OF NEWLY DISCOVERED EVIDENCE.**—Newly discovered evidence whose only tendency is to contradict and impeach the testimony of a witness for the prosecution neither warrants nor requires the granting of a new trial. (People v. Ong Git, 148.)
71. **CRIMINAL TRIAL—GROUNDS FOR EXCLUSION OF PERSON FROM COURTROOM.**—The fact that a person has been guilty of misconduct at the preliminary examination of one accused of murder, in coaching and signaling witnesses for the prosecution, is not a valid ground for his exclusion from the courtroom at the trial of the accused in the superior court; if counsel for the defendant claims that such person has coached witnesses for the prosecution, and that his presence at the trial will intimidate witnesses for the defense, then counsel should develop these facts by cross-examination or independent proof, and not rely on mere assertions, otherwise the court does not abuse its discretion in refusing to exclude such person from the trial. (Id.)
72. **EXCLUSION OF WITNESS—REASONS FOR RULE.**—The purpose of the rule permitting the exclusion of witnesses from the courtroom upon the request of either party is to prevent them from hearing the testimony of a witness under examination. Strictly construed, the rule applies only to a witness of the party adverse to the party making the request; liberally construed, it applies to a witness who, in good faith, has been subpoenaed to testify for either party to the action. (Id.)
73. **EXCLUSION OF WITNESS—DISCRETION OF COURT.**—The exclusion of a witness is not a matter of absolute right in every case. A

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- request therefor is addressed to the discretion of the trial judge, the exercise of which must be controlled largely by the circumstances of the individual case; and the court does not abuse its discretion in refusing to exclude a person who appears to have been subpoenaed by the defense to lay a foundation for his exclusion. (Id.)
74. **INTERPRETER—COMPETENCY—HOW QUESTIONED AND DETERMINED.**—Where the competency of a Chinese interpreter and the accuracy of his interpretation of testimony at the preliminary examination are questioned at the trial of the accused, testimony, by cross-examination or otherwise, may be elicited to show his lack of ability or accuracy in translation, but the court may properly refuse the request of the accused that the interpreter hold a conversation in the Chinese language with Chinese witnesses in the presence of the jury to determine his qualifications. (Id.)
75. **WITNESS—IMPEACHMENT BY TRANSCRIPT OF EVIDENCE AT INQUEST—INTERPRETER.**—The court may properly refuse to permit the accused to show, by a transcript of the testimony taken at the coroner's inquest, that two of the witnesses for the prosecution there made statements irreconcilable with their testimony at the trial, when the testimony at the inquest was given through an interpreter, and he is not produced to prove the correctness of the transcript. (Id.)
76. **HOMICIDE—DEGREE OF OFFENSE—INSTRUCTIONS.**—Where the only defense interposed in a homicide case is that the defendant is not the person who fired the fatal shots, and the evidence is such as to compel the jury either to find the defendant guilty of an offense greater than manslaughter or acquit him, the court is not required to instruct on the subject of manslaughter. (Id.)
77. **INSTRUCTIONS—REFUSAL BECAUSE COVERED BY CHARGE OF COURT.**—The refusal of instructions requested by the defendant is proper where they are covered by the charge of the court. (Id.)
78. **HOMICIDE—PROOF OF CORPUS DELICTI.**—The evidence shows that the deceased in this case was killed by a gunshot wound inflicted by the defendant; an autopsy upon the body was not necessary to the establishment of the *corpus delicti*. (Id.)
79. **REMARKS OF COUNSEL—ADMONITION TO JURY.**—Where the trial court admonishes the jury to pay no heed to remarks of the district attorney, it will be presumed on appeal that the admonition was observed. (Id.)
80. **MISCONDUCT OF COUNSEL—TIME FOR ADMONITION.**—Ordinarily it is better practice to correct an abuse occurring in argument to the jury at the moment of its occurrence, but it was not prejudicial error in this prosecution for homicide for the court to refuse to

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entertain further exceptions while the argument of the district attorney was in progress, and direct counsel for the defendant to note and assign as misconduct any remark which they deemed objectionable and prejudicial at the close of the argument; counsel complying with the ruling, and the court then admonishing the jury at the close of the argument that "the arguments of counsel are of value to you in your deliberations only in so far as they are based upon the testimony that has been given to you by the witnesses upon the stand. Any outside matters that may have been brought into the case by counsel or any of them have no bearing, and should have no weight with you." (Id.)

81. **HOMICIDE—EVIDENCE AS TO IDENTITY OF ACCUSED—PHOTOGRAPHS.**—Where the defense in cross-examination of a witness for the people in a homicide case endeavors to show that shortly after the commission of the crime the witness was uncertain in his identification of the accused, he may testify on redirect examination that a short time after the offense was committed he was shown a photograph of a group of Chinamen and therein recognized and identified the accused. (Id.)
82. **HOMICIDE—SUFFICIENCY OF EVIDENCE.**—In this prosecution for homicide the evidence is sufficient to sustain the conviction of manslaughter, both as showing that a crime was committed and that the defendant was the perpetrator thereof. (*People v. Cramley*, 340.)
83. **REASONABLE DOUBT—SUFFICIENCY OF INSTRUCTIONS.**—An instruction that "if, by the evidence adduced in a criminal action, there is raised in the minds of the jury, upon any hypothesis reasonably consistent with the evidence, a reasonable doubt as to any fact necessary to a conviction, that doubt must be resolved in favor of the defendant," is not erroneous in failing to set out or specify what facts are necessary to warrant a conviction, when the charge as contained in the information is read to the jury in other instructions given by the court, and the jury is told that every material allegation contained in the information is required to be established by proof beyond a reasonable doubt, before a verdict of guilty can be rendered. (Id.)
84. **PRESUMPTION OF INNOCENCE—REFUSAL OF INSTRUCTIONS.**—The refusal of the court to instruct the jury that "the presumption of innocence is one to which the law is partial," and "that where conflicting presumptions supervene, the presumption of innocence must be deemed superior," is not error, if the jury is further instructed that the presumption of innocence must be overcome by the prosecution to the extent that all material facts should be established to the satisfaction of the jury and beyond a reasonable doubt, and the evidence discloses no situation where there arises a conflict of presumptions. (Id.)

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85. **INSTRUCTIONS TO JURY—USE OF DIFFERENT LANGUAGE BY COURT.**—The fact that the court may employ different language in its instructions from that which the defendant may desire shall be used in presenting the same matter to the jury, is not good ground for objections. (Id.)
86. **MANSLAUGHTER—PROPRIETY OF INSTRUCTION DEFINING.**—Where the accused in a homicide case pleads not guilty and seeks to show from the circumstances surrounding the death that the deceased destroyed himself, the court may, of its own motion, properly read to the jury instructions defining the crime of manslaughter; and the defendant cannot complain of a verdict of manslaughter, which is more favorable to him than one which the jury might well have returned under the evidence. (Id.)
87. **MOTIVE FOR HOMICIDE—INSTRUCTIONS WHERE EVIDENCE DIRECT.**—Where much of the evidence in a homicide case is direct and not by way of circumstance, it would not be proper to tell the jury that, under the evidence, proof of express motive is controlling. (Id.)
88. **CROSS-EXAMINATION OF WITNESS—STRIKING OUT ANSWER—HARMLESS ERROR.**—The accused cannot predicate prejudicial error upon the ruling of the court in striking out an answer to a question on cross-examination, if the witness is afterward allowed to answer in regard to the subject of inquiry and thereby give the defendant the benefit of such testimony. (Id.)
89. **MISCONDUCT OF COUNSEL—ABSENCE OF OBJECTION—REVIEW ON APPEAL.**—An alleged improper statement by the district attorney in a homicide trial cannot be complained of on appeal, if the defendant neither objected to the statement nor asked the court to strike it from the record. (Id.)
90. **IMPROPER QUESTION TO WITNESS—REPRIMANDING ATTORNEY.**—It is improper in a homicide case for counsel for the defendant to ask the wife of the deceased on cross-examination if she was arrested about three weeks before for shoplifting, and the court properly reprimands him for asking it. (Id.)
91. **MISCONDUCT OF COURT—COMMENT ON ATTORNEY'S INTELLIGENCE.**—A statement by the court to counsel for the defendant, "I am going to rule in your favor if you have sense enough to keep quiet," is not prejudicial error. The matter of the interchange of courtesies between the judge on the bench and counsel at the bar has been said never to come within purview of a proper subject for review, unless it appears reasonably that the jury has been affected in a way prejudicial to the rights of the defendant. (Id.)
92. **VIEW OF PREMISES—EVIDENCE OF CHANGE IN CONDITION.**—After the jury in a homicide case, pursuant to a request joined in by the defendant, has viewed the premises where the crime was committed,

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the prosecution may be allowed to account for any change in their condition, between their state as shown by the evidence and their appearance at the time the jury inspected them. (Id.)

93. DYING DECLARATION—INSTRUCTION GIVING JURY LIBERTY TO DISREGARD.—An instruction in a homicide case, upon the subject of dying declarations: "Whether the declaration was in fact made under a sense of impending death is a question of fact which most materially affects the question of its credibility, and the determination of the court thereon is not conclusive upon the jury. They have the right, in considering whether they shall accept the declaration as a correct statement, to determine for themselves whether the declarant was in *extremis*, and fully convinced of that fact when making the declaration, and are at liberty to disregard it if not satisfied that it was made under a sense of impending death"—while it correctly commits to the jury the final determination as to whether the declaration was made while the declarant was in *extremis*, and was conscious of the fact of his condition, leaves the jury "at liberty" to regard or disregard the declaration, although it has not been proved to their satisfaction that it was made under a sense of impending death. (People v. Profumo, 376.)
94. INSTRUCTION AS TO DYING DECLARATIONS—WAIVER BY FAILURE TO REQUEST MORE SPECIFIC CHARGE.—This error in such instruction is not waived by the failure of the defendant to request a more specific instruction upon the subject of dying declarations. Where a general instruction is given by the court which is correct as far as it goes, but is merely deficient by reason of its generality, the defendant is bound to request that the charge be made more specific, and in the absence of such request is held to have waived his objection to the instruction; but to hold that an error of an instruction, which merely informs the jury that they are at liberty not to do that which under given conditions they are bound not to do, must be corrected by the defendant at the moment of its commission, under penalty of waiving his right to object to it upon appeal, would be to carry the rule of waiver entirely too far. (Id.)
95. ERROR IN INSTRUCTION AS TO DYING DECLARATION—WHEN HARMLESS.—The misdirection to the jury in such instruction is not such prejudicial error as to have resulted in a miscarriage of justice and require a reversal, where the appellate court, pursuant to its duty under section 4½ of article VI of the constitution, makes an examination of the entire cause, including the evidence, to determine whether the error was prejudicial, and finds that undisputed evidence shows beyond a reasonable doubt and to a moral certainty that the alleged dying declaration of the decedent was in fact so, and was made under a sense of impending death, and that the jury must have so found from the affirmative and unquestioned proofs before them. (Id.)

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96. **DYING DECLARATION—WHAT CONSTITUTES—ADMISSIBILITY IN EVIDENCE.**—A dying declaration is admissible in evidence only when, in the first instance, the court is reasonably satisfied by evidence *alunde* that it was made under a sense of impending death; and, having been so admitted by the court, is competent evidence to be considered by the jury only when they shall also have first satisfied themselves beyond a reasonable doubt that it was made by the declarant as a dying person and under a sense of impending death. (Id.)
97. **MANSLAUGHTER—REFUSAL OF INSTRUCTIONS DEFINING.**—The failure of the court in a homicide case to instruct the jury on the subject of manslaughter is not reversible error, when the elements of manslaughter are not reasonably deducible from the evidence. (Id.)
98. **CONFESSION OBTAINED BY POLICE OFFICERS—WHEN NOT VOLUNTARY.**—Where police officers procure a confession from a Chinaman by persistent questioning when he is apparently frightened and unwilling to answer after having been arrested for murder, there being present with him no interpreter or any person of his own nationality through whom he may clearly make known his disinclination to speak, or express understandingly any explanations which he may desire to give, the confession is involuntary, though no physical force is used and no threats or promises are made. (People v. Quan Gim Gow, 507.)
99. **PARTICIPATION OF POLICE OFFICERS IN PROCURING CONFESSION AS SHOWING ITS INVOLUNTARY CHARACTER.**—The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character. (Id.)
100. **ERROR IN ADMITTING CONFESSION IN EVIDENCE—WHEN PREJUDICIAL.**—The admission of such confession in evidence in a prosecution for murder to prove that the defendant, who made it, fired the fatal shot, is reversible error where the case as presented to the jury, without the confession, is such as might leave the jury in doubt as to whether the defendant committed the crime. (Id.)
101. **HOMICIDE—ADMISSIBILITY IN EVIDENCE OF PIECES OF BUGGY SHAFT.**—In a prosecution for murder, where the evidence is purely circumstantial, pieces of a buggy shaft, found on the premises where the crime was committed, are admissible in evidence, there being evidence tending to show that the fatal blow received by the deceased was administered by the use of the shaft. (People v. Wilson, 513.)
102. **FOREMAN OF CORONER'S JURY AS WITNESS—CROSS-EXAMINATION—INTRODUCTION OF CORONER'S VERDICT.**—In such prosecution it is proper, on the cross-examination of the prosecuting witness, who was foreman of the coroner's jury, to refuse to admit in evidence the

CRIMINAL LAW (Continued).

verdict of such jury certifying that they did not know who killed the deceased. (Id.)

103. EVIDENCE OF PRIOR ACTS OF VIOLENCE—REFUSAL TO STRIKE OUT—NONPREJUDICIAL ERROR.—When in such prosecution evidence is admitted of violence suffered by the deceased on a certain occasion, but the defendant is not shown to have been connected therewith, it is error to refuse to strike out such evidence; but the error is not to be regarded as prejudicial on appeal, when the record contains other evidence of actual violence on other occasions on the part of the defendant toward the deceased. (Id.)
104. EVIDENCE—PREVIOUS HOSTILITY AND VIOLENCE—RE MOTENESS IN TIME.—Testimony in a homicide case that the defendant has at different times within a year or two before the death of the decedent quarreled with and expressed hostility toward the deceased is admissible as tending in some degree to show malice and motive with reference to the offense charged. The objection as to the remoteness of the occurrences goes to the weight rather than to the admissibility of the evidence. (Id.)
105. THREATS AGAINST AND ASSAULTS UPON DECEASED—EVIDENCE—INSTRUCTIONS.—An instruction that "evidence has been introduced as to altercations with, threats against and assaults upon the deceased by the defendant. This evidence has been admitted for the sole purpose of showing the relations existing between the deceased and the defendant, and for the purpose of showing motive, if any; and may be considered by you as a circumstance in connection with the other facts and circumstances in the case in determining whether or not the defendant is guilty of the crime charged,"—is not objectionable, (although it might have been phrased more carefully), as telling the jury that those altercations, assaults, and threats actually occurred. (Id.)
106. CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION—ARGUMENTATIVE INSTRUCTIONS.—An instruction in a homicide case, where the evidence is purely circumstantial, that "counsel for defendant has referred to a number of cases wherein convictions have been sought and had upon strong circumstances of guilt proved against the accused in those cases, and afterward it has transpired that the accused was innocent, notwithstanding the strong circumstances shown against him. These cases are extreme cases, and probably do not occur but seldom in cases decided upon circumstantial evidence. Reference to such cases is proper in order to make the jury careful in arriving at the proper conclusion from such evidence; but the plain, practical rules of evidence which have been established for ages ought not to be shaken because of the reference to extreme cases by counsel wherein improper convictions have been had—and if much search be made, it would be

CRIMINAL LAW (Continued).

found that probably a greater number of cases might be cited wherein improper convictions have been had from direct and positive evidence through inattention or perjury of witnesses. All human testimony is fallible. But jurors in their decision must take and consider circumstances and if sufficient act upon them, although the main fact is proved by no eye-witness," is argumentative and should not be given. (Id)

107. **PROOF OF MOTIVE—INSTRUCTION SIMILAR TO ONE REQUESTED BY DEFENDANT.**—Where the defendant in a homicide case has requested an instruction that "it is not indispensable to a conviction of the defendant that a motive be shown for his commission of the crime," he cannot complain of an instruction given by the court that "in criminal cases the proof of the moving cause is permissible and oftentimes valuable, but is never essential." The defendant cannot complain of instructions which are in substance the same as those requested by him. (Id.)
108. **EVIDENCE OF GOOD CHARACTER OF DEFENDANT—REFUSAL OF INSTRUCTIONS CONCERNING.**—Where the defendant in a homicide case has introduced in evidence the testimony of several witnesses who have been acquainted with him for many years, showing his good reputation "for peace and quietude and truth and veracity" in the communities where he has lived, and has requested the court to give the jury certain instructions pertinent to this evidence, the refusal of the court to give such instructions must, under the circumstances of this case, be regarded as prejudicial error resulting in a miscarriage of justice and calling for a reversal of the judgment of conviction. (Id.)
109. **EFFECT OF PROOF OF GOOD CHARACTER—NECESSITY OF JURY GIVING IT CONSIDERATION.**—Proof of good character comes in aid of the general presumption of innocence, and is no more to be laid out of view by the jury in their deliberations than is the original presumption itself; it is itself a fact in the case. (Id.)
110. **APPEAL—"MISCARRIAGE OF JUSTICE"—MEANING OF PHRASE.**—The phrase "miscarriage of justice," within the meaning of section 4½ of article VI of the constitution, does not simply mean that a guilty man has escaped, or that an innocent man has been convicted. It is equally applicable to cases where the acquittal or the conviction has resulted from some form of trial in which the essential rights of the people or of the defendant were disregarded or denied. The right of the accused in a given case to a fair trial, conducted substantially according to law, is at the same time the right of all inhabitants of the country to protection against procedure which might at some time illegally deprive them of life or liberty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure,

CRIMINAL LAW (Continued).

in which the substantial rights belonging to defendants shall be respected. (Id.)

111. **HOMICIDE—PHOTOGRAPHS OF DECEASED—ADMISSIBILITY IN EVIDENCE.**—In a prosecution for murder by beating, several large vivid, striking, but correct photographs of the decedent's bruised and battered head and face, produced and identified by the physician who made the autopsy, are admissible in evidence, notwithstanding their gruesome and striking presentment of the features of the deceased may excite the horror and indignation of the jury. (People v. Balestieri, 708.)
112. **PHOTOGRAPHS OF DECEASED—TAKING TO JURY ROOM.**—It is not improper to permit the jury, after such photographs have been introduced in evidence, to take them into the jury room. (Id.)
113. **TAKING EXHIBITS TO JURY ROOM—TIME AND MANNER OF OBJECTION THERETO.**—Alleged error in permitting the jury to take exhibits to the jury room cannot be urged for the first time on appeal, where the only objection made at the trial was the objection previously made to their introduction in evidence. (Id.)
114. **CODE SECTIONS—LIBERAL INTERPRETATION IN PERMITTING EXHIBITS TO GO TO JURY ROOM.**—Section 612 of the Code of Civil Procedure, which is identical in terms with section 1137 of the Penal Code, is to be construed as an extension and not a limitation of the common law relating to exhibits, and the court may permit the jury to take with them and use in their deliberations any exhibit, except depositions, where the circumstances call for it. (Id.)
115. **HOMICIDE—CAUSE OF DEATH—SUFFICIENCY OF EVIDENCE.**—In this prosecution for homicide the verdict of the jury that the deceased came to her death by violence inflicted by the defendant, not by cocaine administered by herself, is sustained by the evidence, circumstantial and expert, although there is conflict in the latter. (People, v. Hales, 731.)
116. **CORPUS DELICTI—BURDEN AND MANNER OF PROOF—CIRCUMSTANTIAL EVIDENCE.**—In a homicide case the burden is on the prosecution to establish the *corpus delicti* to a moral certainty and beyond a reasonable doubt, but it may do so either by direct or circumstantial evidence, and the sufficiency of either or both depends largely upon the character of the individual case. (Id.)
117. **CONFLICTING EVIDENCE—RIGHT OF JURY TO REJECT TESTIMONY.**—In the presence of a conflict of evidence in a homicide case, however created, the jury is at liberty to reject that which it deems unworthy of credence. (Id.)
118. **CIRCUMSTANTIAL EVIDENCE—WEIGHT AS COMPARED WITH OTHER TESTIMONY.**—The law does not belittle the value of circumstantial evidence by making a relative distinction between it and direct

CRIMINAL LAW (Continued).

evidence, nor give a sanctity or an influence to the mere opinion of an expert witness greater or more controlling than that which it accords to circumstantial evidence. (Id.)

119. **EXPERT TESTIMONY—CREDIBILITY AND WEIGHT.**—The opinion of an expert witness is neither conclusive nor controlling beyond its weight, which must be ascertained by the same rules ordinarily applied to the reception and consideration of all other evidence, whether it be direct or circumstantial. (Id.)
120. **DEPOSITION TAKEN UPON PRELIMINARY EXAMINATION—INSUFFICIENT IDENTIFICATION.**—In a prosecution for homicide the deposition of a witness, taken before the magistrate upon the preliminary examination of the defendant, is not admissible, if it is without title or cause, although in his certificate the reporter certifies the same to be a "correct report of the testimony and proceedings upon the preliminary examination of the above-entitled cause." (People, v. Dean, 745.)
121. **ADMISSION OF DEPOSITION IN EVIDENCE—HARMLESS ERROR.**—But the admission of such deposition in evidence was not prejudicial to the substantial rights of the defendant, where the testimony given by the witness in the deposition, while material, was merely cumulative of the testimony given by another witness, and the jury could not properly have reached a verdict other than that given, even if the deposition had been excluded. (Id.)
122. **RAPE—PROOF OF SERIES OF ACTS—ELECTION BY PROSECUTION.**—In prosecutions for rape, where a single act is charged and a series of acts of intercourse are proved, the prosecution must select the particular act relied upon. (People, v. Mancuso, 146.)
123. **ELECTION—WAIVER BY ACCUSED.**—But if a specific act of intercourse is alleged by the information, and proof of that act with many others is made, no objection being made to any of the testimony, and the defendant making no complaint that he is in doubt as to which act is the basis of the prosecution, his right to a more definite selection of the principal act will be deemed waived. (Id.)
124. **MISCONDUCT OF DISTRICT ATTORNEY—REFERENCE TO PRIOR IMPRISONMENT.**—Misconduct of the district attorney in bringing out on cross-examination of the wife of the defendant that he has served a term in jail is not prejudicial, when a statement to the same effect has already inadvertently crept into the case. (Id.)
125. **MISCONDUCT OF DISTRICT ATTORNEY—WHEN NOT REVIEWABLE ON APPEAL.**—Misconduct of the district attorney will not be considered on appeal, if no assignment of misconduct is made at the time nor request made for the court to instruct the jury to disregard it. (Id.)
126. **MISCONDUCT OF DISTRICT ATTORNEY—EFFECT OF ADMONITION TO JURY.**—Misconduct of the district attorney in his argument to the

CRIMINAL LAW (Continued).

- jury in observing that he cannot go fully into defendant's story of the case on cross-examination because of his very meager direct examination, is not prejudicial, if the court, upon objection, immediately directs the jury to disregard the comment. (Id.)
127. **INFORMATION—WAIVER OF OBJECTIONS IN ABSENCE OF DEMURRER.** An objection to an information that it does not substantially conform to the requirements of sections 950 and 952, of the Penal Code, will be regarded as waived in the absence of a demurrer. (People v. Horvath, 306.)
128. **RAPE—INFORMATION IN LANGUAGE OF STATUTE.**—An information for rape, drawn in substantial compliance with section 261 of the Penal Code, is sufficient. (Id.)
129. **SUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT OF GUILTY.**—In this prosecution for rape the evidence is sufficient to support the verdict of guilty. (Id.)
130. **MISCONDUCT OF DISTRICT ATTORNEY—ASSIGNMENT OF ERROR—REVIEW ON APPEAL.**—Asserted error of the trial court in failing to instruct the jury to disregard certain alleged prejudicial remarks of the district attorney during the argument of the case will not be considered on appeal where the record fails to show what such remarks were, or that any objection was made to them at the time, or that any request for an instruction to the jury to disregard them was ever made. (Id.)
131. **RAPE—TIME OF COMMISSION OF OFFENSE—EVIDENCE—INSTRUCTIONS.**—Where in a prosecution for rape evidence is introduced showing that the prosecutrix visited the defendant's place of business (where the offense is alleged to have been committed on March 2d) on March 23d and on March 27, 1913, but there is no evidence of an unlawful act between them on either of those latter occasions, and her testimony that she never had intercourse with him except on the one occasion of March 2d, is not contradicted by other testimony, an instruction to the jury that "an act of sexual intercourse committed on a girl under sixteen years of age not the wife of the accused is rape, the date of such act is immaterial, if it occurs at any time within three years before the filing of the information. The witnesses for the prosecution fix the date of the act testified to by them as March 2, 1913. If they are mistaken in the date this is immaterial," is not erroneous or misleading, when there is no evidence of the commission of but the one offense, and the jury is also advised that any other misconduct of the defendant is not material or proper to bring before them. (People, v. Carmean, 396.)
132. **EVIDENCE ADMITTED FOR LIMITED PURPOSE—INSTRUCTIONS TO JURY—FAILURE TO REQUEST.**—The failure of the court to tell the jury that evidence of improper familiarity on the part of the defendant

CRIMINAL LAW (Continued).

with the prosecutrix was admitted solely for the purpose of proving his adulterous disposition, and not as evidence of the commission of a crime on former occasions, is not error if no such instruction is asked. Where a defendant desires to restrict evidence to a particular purpose, he should so frame his objections, and ask a proper instruction to the jury. (Id.)

133. MISCONDUCT OF DISTRICT ATTORNEY—FAILURE TO OBJECT—REVIEW ON APPEAL.—Alleged misconduct of the district attorney in asking witnesses improper questions will not be considered on appeal, in the absence of specific objection and exception based thereon. (Id.)

134. EXAMINATION OF WITNESS—OVERRULING OBJECTION TO QUESTION—HARMLESS ERROR.—Error, if any, in overruling an objection to a question propounded by the district attorney to the prosecuting witness in a rape case, is not prejudicial, if the fact testified to by the witness in response to the question has already been proved by necessary inference from answers previously given, and is established without conflict as a fact in the case. (People, v. Sanchez, 742.)

135. DEFECT IN INFORMATION—REVIEW ON APPEAL FROM ORDER REFUSING NEW TRIAL.—A defect in an information cannot be considered on an appeal from an order refusing a motion for a new trial. (Id.)

136. ROBBERY—HEARSAY EVIDENCE AS TO REPUTATION OF ACCUSED—LETTER FROM CHIEF OF POLICE.—In a prosecution for robbery, it is error to admit in evidence a letter received from a city chief of police by the constable of the township wherein the crime was committed, which tends to show that the accused is a man of bad character, that he has several aliases, that he has been convicted of grand larceny, that he has been previously arrested upon a charge of highway robbery, and that he is well known to the police of such city, who have his criminal record, photograph, and Bertillon description. (People v. Powers, 447.)

137. OBJECTION TO EVIDENCE—WAIVER BY STIPULATION THAT IT BE READ TO JURY.—Where such hearsay evidence is admitted over objection and is about to be handed to the jury, objection to its admission is not waived by counsel for defendant insisting that it be read to the jury and stipulating to that effect, after again objecting to it as evidence. (Id.)

138. HEARSAY EVIDENCE—ERROR IN ADMITTING—WHEN NOT CAUSE FOR REVERSAL.—Error in the admission of such evidence is not cause for a reversal of a judgment of conviction, where the evidence of guilt is positive, direct, and certain, and not contradicted by the defendant himself, who voluntarily took the stand, but testified only to a fact not in dispute. (Id.)

See Divorce, 7.

CRUELTY. See Divorce, 1-4.

DAMAGES.

1. **CONTRACT TO EXCHANGE LANDS—DAMAGES FOR BREACH—WHEN NOT RECOVERABLE.**—Damages for the breach of a contract to exchange lands are not recoverable in an action wherein it appears from the evidence that the relative values of the properties are such that the plaintiff suffered no damage from the refusal of the defendant to carry out the agreement and make the exchange. (*Strait, v. Wilkins*, 774.)
2. **NOMINAL DAMAGES—JUDGMENT FOR REFUSED.**—In such action a judgment for nominal damages, which will carry costs, will be denied, under the rule that a judgment for such damages is justified only on the ground that it conserves some right of the plaintiff which has been nominally infringed, and which might else be lost by acquiescence and lapse of time. (*Id.*)
3. **AMENDMENT OF ANSWER BY STRIKING OUT PARAGRAPH—DISCRETION IN PERMITTING.**—The court does not err in such action in permitting the defendants to amend their answer by striking out a certain paragraph thereof, especially if it allows a continuance of one week on account of the amendment. (*Id.*)
4. **MARKET VALUE OF LAND—EVIDENCE—TIME OF VALUATION.**—In admitting evidence in such action of the market value of properties the court is required, in the exercise of a sound discretion, to limit the proof to a period reasonably proximate to that of the date of the alleged breach of the contract. (*Id.*)

See Building Contract.

DEBTOR AND CREDITOR. See Accord and Satisfaction; Attachment; Banks, 1.

DEDICATION. See Streets, Roads, and Highways, 1, 2.

DEED.

1. **PLEADING NONDELIVERY IN ACTION TO ESTABLISH TRUST IN LAND—LEGAL CONCLUSIONS.**—A complaint in an action to establish that a grantee holds the land in trust on the theory that there has been no delivery of the deed, which alleges that there has been "no valid delivery" of the deed, that the grantor "never intended to convey said property except upon the conditions hereinbefore stated," and that the defendant, with intent to defraud the plaintiffs, "obtained possession thereof without right," is insufficient as against demurrer. The use of the words "valid," "without right," "unlawfully," etc., are allegations of legal conclusions. (*Fisher v. Fisher*, 310.)

DEED (Continued).

2. **INSUFFICIENT ALLEGATION OF NONDELIVERY—PRESUMPTION OF DELIVERY.**—If the complaint in such action fails sufficiently to allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against the pleader, that there was some sort of a delivery of the instrument, qualified or otherwise. (Id.)
3. **CONDITIONAL DELIVERY OF DEED—WHETHER BECOMES ABSOLUTE.**—Where the grantor delivers a deed to his grantee with the intent that it shall convey title only in the event that the grantor shall not survive a contemplated surgical operation, the delivery is governed by the provisions of section 1056 of the Civil Code and becomes absolute and final. (Id.)
4. **DEEDS IN HANDS OF GRANTEE—PRESUMPTION OF DELIVERY—PLEADING NONDELIVERY.**—There is a presumption that a deed found in the hands of the grantee was rightfully delivered; and in an action to establish a trust in the land on the theory of nondelivery of the deed, an express allegation of nondelivery, or of facts as to the obtaining of the possession of the deed by the grantee which show in themselves that there could have been no delivery, is necessary to the statement of a good cause of action. (Id.)

See Criminal Law, 35-38; Escrow; Evidence, 1, 2.

DELIVERY. See Deed; Escrow.

DEMURRER. See Appeal, 11, 16.

DEPOSITION.

1. **ISSUANCE OF COMMISSION TO NOTARY AS PERSON AGREED UPON BY PARTIES.**—Where the parties to an action in this state stipulate that the deposition of a person "be taken before E. C. Ferguson, a notary public in and for the city of Chicago," the court may construe the term "notary public" as words of description, and, under section 2024 of the Code of Civil Procedure, issue the commission to him as the person agreed upon by the parties rather than to him in his official capacity. (Henry v. Caswell, 14.)
2. **SEAL OF NOTARY—WHETHER NECESSARY.**—Where a commission is thus issued to a notary as an unofficial person to take the deposition of a witness out of the state, pursuant to the stipulation of the parties, it is not necessary for the notary, in order for the deposition to be admissible in evidence, to attach his seal to his certificate. (Id.)

See Costs, 2, 3, 5.

DESERTION. See Husband and Wife, 1.

DISMISSAL. See Practice, 1-4.

DIVORCE.

1. **CRUELTY—ACTS CONSTITUTING—SUFFICIENCY OF COMPLAINT.**—In an action for divorce on the ground of cruelty, the complaint states a cause of action if it alleges generally that the defendant wrongfully and willfully inflicted upon the plaintiff a course of grievous mental suffering and grievous bodily injury, and further specifically alleges, among other acts of violence, that the defendant, without reasonable cause or excuse, slapped the plaintiff's face and injured her person so as to leave black and blue spots thereon for several days. (*Knapp v. Knapp*, 10.)
2. **DIVISION OF COMMUNITY PROPERTY—PRESUMPTION ON APPEAL.**—In such case the appellate court, in the absence of the evidence, will assume that the facts warranted the distribution of the community property made by the trial court between the parties. (*Id.*)
3. **DISPOSITION OF COMMON PROPERTY—DISCRETION OF TRIAL COURT.**—Where a divorce is granted on the ground of cruelty, section 146 of the Civil Code leaves the disposition of the community property, in the first instance, to the discretion of the trial court, with perhaps the qualification that, as a general rule, more than one-half of such property must be decreed to the innocent spouse. (*Id.*)
4. **SEPARATE PROPERTY—DISPOSITION IN DECREE.**—The statute does not contemplate the disposition in the decree of the separate property, but of the community property only. (*Id.*)
5. **APPEAL—ERRORS OF WHICH DEFENDANT CANNOT COMPLAIN.**—If the trial court failed to accord to the plaintiff what the findings of fact show she was entitled to in the way of property rights, it is of no legal concern to the defendant on appeal. (*Id.*)
6. **DECREE FOR ALIMONY—SUPPORT OF CHILD.**—Where it is ordered, in an action by a wife for a divorce, "that the entire care, custody and control of Dorothy M. Hartman, the minor child of said parties to this action, be and the same is hereby awarded to the plaintiff together with the sum of twenty dollars per month for her support and maintenance," the decree is not to be construed as requiring the husband to contribute to the support of the child. (*People v. Hartman*, 72.)
7. **CRIMINAL LAW—FAILURE OF PARENT TO SUPPORT CHILD—EFFECT OF DIVORCE.**—Where the custody of a minor child has been awarded to the wife in an action for divorce, and the decree does not require the husband to contribute to its support, he is not liable to a criminal prosecution under section 270 of the Penal Code for omitting to provide the child with necessaries, in the absence of proceedings under sections 138 and 139 of the Civil Code to require him to contribute to the child's support. (*Id.*)
8. **CONFLICT IN EVIDENCE—DENIAL OF DECREE—APPEAL.**—Where the evidence is conflicting in an action by a husband for a divorce on the ground of desertion by reason of his wife's persistent refusal

DIVORCE (Continued).

to have reasonable matrimonial intercourse with him, a judgment denying a divorce will be affirmed on appeal. (*Young v. Young*, 247.)

9. **RESIDENCE OF PARTIES—SUFFICIENCY OF FINDING.**—A finding in an action for divorce that both the plaintiff and the defendant have been residing in the county and state for a period of more than one year "now last past" is not a finding that they or either of them have resided within the jurisdiction for one year next preceding the commencement of the action, and is not sufficient to sustain a decree of divorce. (*Coleman v. Coleman*, 423.)
10. **RESIDENCE OF PARTIES—JURISDICTIONAL FACTS—PLEADING AND PROOF.**—No divorce can be had unless this jurisdictional fact appears, that the plaintiff has been a resident of the state for one year, and of the county three months, next preceding the commencement of the action, and proof thereof is a prerequisite to the granting of the divorce. A mere admission in the pleadings of such residence is insufficient; the plaintiff must aver and prove that he or she has been a *bona fide* resident for the requisite period. (*Id.*)
11. **NONRESIDENT—CROSS-COMPLAINT—RIGHT TO RELIEF.**—The amendment of 1911 to section 128 of the Civil Code, providing relief for a cross-complainant in divorce who is not a resident of the state, or of the county in which the action is brought, is not broad enough to entitle him to affirmative relief, unless proof is offered that the plaintiff has resided in the jurisdiction for the requisite period. (*Id.*)
12. **APPEAL BY WIFE—COSTS AND COUNSEL FEES.**—Where a wife in good faith takes an appeal from a judgment denying her a divorce, and is without means to prosecute it, but her husband is financially able to defray the expense thereof, it is an abuse of discretion for the trial court to refuse to make her a reasonable allowance for costs and counsel fees. (*Id.*)
13. **APPEAL—INSUFFICIENT FINDINGS AS TO RESIDENCE.**—Where, upon an appeal from a judgment on the judgment-roll in an action for divorce, a reversal is necessary because of the insufficiency of the finding as to the residence of the parties, it is proper to direct the making of a new finding on such subject, and to provide that upon it and the remaining findings the appropriate judgment be rendered and entered. (*Id.*)
14. **REMAND OF CASE—NEW FINDINGS UPON SINGLE ISSUE.**—A case may be remanded with directions to the trial court to find upon a single issue, leaving the other findings to remain as a part of the record. (*Id.*)

DRAINAGE DISTRICT.

1. **DRAINAGE ACT—ADJUSTMENT OF ASSESSMENT BY BOARD OF EQUALIZATION—REVIEW BY COURTS.**—Under the Drainage Act (*Stats.* 28 Cal. App.—54

DRAINAGE DISTRICT (Continued).

1885, p. 204; 1891, p. 262; 1909, p. 25) the action of the board of equalization in adjusting an assessment is not conclusive upon the landowners, but is subject to review by the courts. (*Payne v. Ward*, 492.)

2. DRAINAGE ASSESSMENTS—MANNER OF LITIGATING VALIDITY—ACTION TO RESTRAIN FORECLOSURE.—The litigation of the validity of the assessment may be had in an action brought by the property owners themselves to nullify the action of the board of equalization and to restrain the trustees from bringing suits to foreclose the liens of the assessment. (*Id.*)

EASEMENT.

1. EXTINCTION THROUGH NONUSER AND ADVERSE POSSESSION.—While the mere nonuser of an easement acquired by grant for any period of time will not of itself operate to extinguish it, yet when such nonuser is coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the period prescribed by law, the easement will be extinguished by the statute of limitations. (*City and County of San Francisco v. Main*, 86.)
2. PUBLIC STREET—CLOSING BY CITY—RIGHTS OF ABUTTING OWNER LOST BY LIMITATIONS.—Where a city formally and physically closes a street, constructs valuable improvements therein, and maintains adverse possession of the land to the exclusion of any right of easement therein by an adjacent property owner, his right to an easement is barred by limitations after the lapse of ten years. (*Id.*)

ELECTION.

1. PRINTING OF BALLOTS—CANDIDATE OF MORE THAN ONE PARTY.—It was the intention of the legislature, as expressed in section 1197 of the Political Code, that where a candidate is the nominee of two or more political parties, his name should appear upon the ballot but once, followed by appropriate words designating him as the candidate of such parties; but this provision, like many other minute directions contained in such section, is not essential to the validity of the election but is directory only. (*Dennen v. Jastro*, 264.)
2. BALLOTS—PRINTING NAME OF CANDIDATE TWICE.—To print the name of a candidate of two political parties for the office of supervisor twice upon the ballot, followed by the separate designation of each political party, instead of but once followed by the designation of both parties, while an irregularity, does not invalidate the election. (*Id.*)
3. ELECTION LAWS—FAILURE TO COMPLY WITH TECHNICAL DIRECTIONS—WHETHER INVALIDATES ELECTION.—A failure to comply with some technical direction of an election statute, where due alone to

ELECTION (Continued).

mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballots, should not disfranchise the entire vote of the district and vitiate the election, unless it is made to appear that by reason of the irregularity the result was different from what it would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the candidate for the office. (Id.)

4. **BALLOT—DISTINGUISHING MARK—CROSS OUTSIDE SQUARE.**—A cross on a ballot, made by the voter with the voting stamp, immediately to the right of the name of one of the candidates, and not in the voting square, constitutes a distinguishing mark under section 1205 of the Political Code. (Gray v. O'Banion, 468.)
5. **DISTINGUISHING MARK ON BALLOT—WHAT CONSTITUTES.**—A distinct mark in the form of < on a ballot between the words "amend" and "section" in a referendum proposition which, from its position on the ballot with reference to the other marks properly made with the voting stamp, cannot be regarded as a transfer from such marks caused by the folding of the ballot, is a distinguishing mark. (Id.)
6. **BLURS AND OFFSETS DUE TO FOLDING BALLOT.**—Blurs caused by the awkward handling and folding of ballots, and offsets, that is, the transference of the mark of the voting stamp through the folding of ballots before the ink becomes dry, are not distinguishing marks. (Id.)
7. **EDUCATIONAL QUALIFICATION OF VOTER—FINDING OF TRIAL COURT.—CONCLUSIVENESS.**—A finding of the trial court in an election contest that a voter was under sixty years of age at the time of the adoption of the constitutional amendment prescribing an educational qualification of voters, is conclusive on appeal. (Id.)
8. **RESIDENCE OF VOTER—DWELLING ON LINE DIVIDING TWO DISTRICTS.**—Where the dividing line between two supervisorial districts runs through a dwelling-house, so that the greater part of the dining room is in one district and the other rooms are mostly or altogether in the other district, the owner or occupant has the right to vote in the latter district. (Id.)
9. **VOTING IN WRONG DISTRICT—WHETHER BARS VOTING IN RIGHT ONE.**—And his right to vote there is not affected by the fact that heretofore he has illegally voted in the other district. (Id.)
10. **DOMICILE OF LABORERS ON RANCH—DWELLING IN ONE DISTRICT—BUNKHOUSE IN ANOTHER.**—Where the boundary line between two election districts divides a ranch so as to leave a bunkhouse and a larger part of the dining-room of the dwelling-house in one district, and the remaining and larger portion of the dwelling-house in the other district, unmarried laborers employed on the ranch, who sleep

ELECTION (Continued).

in the bunkhouse and take their meals in such dining-room, are entitled to vote in the first district. (Id.)

See Municipal Corporations, 11.

EMBEZZLEMENT. See Criminal Law, 24, 25.

EMINENT DOMAIN.

LEASED PREMISES—VALUE OF LEASEHOLD AND OF RIGHT TO REMOVE BUILDINGS—AWARD MADE BY JUDGMENT—PRESUMPTION.—Where the judgment in eminent domain proceedings awards a certain amount to the owner of the property and a certain amount to his lessees, who have the right, under the lease, to remove the improvements at the end of the term, it will be presumed, in a subsequent action on the lease to recover rent, wherein the lessees set up as a counterclaim that the award to them did not include the value of the right to remove the improvements, that in the judgment in the condemnation proceedings the rights of all parties interested in the property condemned, whether as owners or lessees, were fully and correctly determined, and the value of each particular interest fixed and award thereof made to the owner. (*Harrelson v. Oro Grande Lime and Stone Co.*, 479.)

ESCROW.

1. **WHAT CONSTITUTES—DELIVERY OF DEEDS TO BANK TO AWAIT DECISION OF COURT.**—Where two parties deliver three deeds to a bank, the plaintiff delivering two and the defendant one of them, under an agreement that the plaintiff, thirty days after notice of the affirmance of a certain decision by the supreme court and upon delivery to him of the third deed with certificate of title, will pay one thousand dollars to the bank on the defendant's account, and that the bank will then deliver his two deeds to the defendant, and that in case of default by the plaintiff the bank will, on demand, deliver the three deeds to the defendant, but that in case the supreme court reverses the decision in question the bank will return the deeds to the respective parties, the transaction constitutes a delivery to the bank in escrow. (*Doran, Brouse & Price v. Bunker Hill Oil Mining Company*, 644.)
2. **UNAUTHORIZED WITHDRAWAL OF DEEDS—DELIVERY UPON FALSE REPRESENTATIONS.**—In such case the defendant has no right to withdraw any of the deeds before the expiration of the time fixed for the happening of the event, or the performance of the condition upon which they are to be delivered; and if by means of false representations he obtains possession of the plaintiff's deeds and withdraws them from the depository, there is no valid delivery to him and he will be deemed to hold them and the property in trust for the plaintiff. (Id.)

ESCROW (Continued).

3. **TRUST—ACTION TO ENFORCE—SUFFICIENCY OF COMPLAINT.**—The complaint, in an action involving such transaction, which alleges such agreement and escrow, as well as the defendant's acts in wrongfully obtaining possession of the deeds, and prays that it be declared that the deeds and property are held by the defendant in trust for the plaintiff, as shown by the escrow agreement, is good as against general demurrer. (Id.)
4. **INTERPRETATION OF ESCROW AGREEMENT—DELIVERY OF DEEDS—TITLE OF DEFENDANT.**—It appears from the language of such escrow agreement that it was the intention of the parties that, while the defendant could not enforce specific performance of the contract by compelling the plaintiff to pay the ten thousand dollars without a title based upon a patent, he could, upon the decision referred to in his favor being affirmed by the supreme court, without showing title in fee vested in him, insist that the plaintiff should accept the deed as conveying such title as the defendant possessed and pay therefor the sum of ten thousand dollars, or, in the event of his failure so to do, insist upon his right to have the deeds held by the bank delivered to him. (Id.)

ESTATES OF DECEASED PERSONS.

ACTION ON CLAIM—SUFFICIENCY OF COMPLAINT.—A complaint, in an action against an executor on a promissory note executed by the decedent, which alleges the nonpayment of the original obligation and its due presentation to and rejection by the executor, sufficiently states a cause of action, and it is not necessary to further aver that the executor has not paid the claim. (*William Nicol Company v. Cameron*, 124.)

See Corporations, 4, 5; Inheritance Tax; Wills.

ESTOPPEL. See Judgment, 5; Streets, Roads, and Highways.

EVIDENCE.

1. **SUIT TO QUIET TITLE—BURDEN OF PROOF.**—Where the defendant, in an action involving title to land, bases his claim of title on a deed from the plaintiff, the plaintiff is not required to prove title in himself prior to the date of such deed. (*Strange v. Strange*, 281.)
2. **CONFLICTING EVIDENCE—CONCLUSIVENESS ON APPEAL.**—A finding of the court in such action as to the intention of the grantor in delivering such deed, based on evidence substantially conflicting, will not be disturbed on appeal. (Id.)
3. **ACTION FOR MEDICAL SERVICES—EVIDENCE OF REASONABLE VALUE.**—In this action to recover for medical services, the evidence supports a judgment in favor of the plaintiff for their reasonable value. (*Merchants' Collection Agency v. Gopcevie*, 216.)

EVIDENCE (Continued).

4. ACTION FOR MONEY HAD AND RECEIVED—WRITTEN SETTLEMENT—ORAL EVIDENCE OF OMITTED ITEM.—Where it is shown, in an action for money had and received by the defendants for the use and benefit of the plaintiff, that the parties made a settlement in writing, parol evidence is not admissible that prior to the written settlement the plaintiff paid the defendants five hundred dollars which, by inadvertence, was not entered in the books of the plaintiff, and consequently was not taken into consideration in the negotiations for settlement, nor had the plaintiff received credit for the same. (Third Street Improvement Company v. McLelland, 369.)
5. ORAL NEGOTIATIONS—MERGER IN WRITTEN SETTLEMENT.—The moment it appeared that the parties had stated their account in writing, a presumption arose that the payment of the five hundred dollars made prior thereto, together with all previous oral negotiations, were merged in the written agreement. (Id.)
6. MISTAKE IN SETTLEMENT—AMENDMENT OF COMPLAINT SO AS TO HAVE CONTRACT REFORMED.—But it was reversible error to refuse the plaintiff leave to amend its complaint by adding a count thereto in which to allege the mistake of fact in the agreement of settlement, and praying for the reformation of the contract and the recovery of the five hundred dollars overpaid. (Id.)
7. WITNESS—CROSS-EXAMINATION AS TO DEPRESSION IN STREET—WHETHER QUESTION CALLS FOR CONCLUSION.—Where, in an action by a pedestrian for personal injuries sustained from stepping into a depression left in a street by a gas company, a photograph of the depression, taken the day following the accident, is admitted in evidence, and the witness who took it testifies that he made no examination of the depression on the day of the accident, but that the street was in the same condition when he took the photograph as when the accident occurred, it is proper cross-examination to ask him how he knows the conditions were identical. (Rawles v. Los Angeles Gas & Electric Corporation, 455.)
8. CROSS-EXAMINATION—OPINION OR CONCLUSION OF WITNESS—REFUSAL TO STRIKE OUT.—Where a witness in such case, who visited the scene of the accident, has testified on direct examination as to the dimensions of the depression, is asked on cross-examination, "How did you happen to go down and visit that hole?" and in reply says, among other things, that on seeing the depression he stated this "is gross carelessness on the part of this party that dug this hole," it is error to refuse to strike out such opinion or conclusion. (Id.)
9. ORDINANCE REGARDING STREET EXCAVATIONS—INTRODUCTION IN EVIDENCE—INSTRUCTIONS.—If in such action a city ordinance is introduced in evidence, detailing the requirements as to making and refilling excavations in streets, and containing provisions beneficial

EVIDENCE (Continued).

to the city as administrative regulations and other provisions for the benefit of persons using the street, and the court gives a general instruction that a violation of the latter provisions, if the proximate cause of the plaintiff's injuries, is sufficient to show a breach of duty and consequent negligence, it might well go further and define the provisions designed for the benefit of private persons. (Id.)

10. **COMPELLING PRODUCTION OF BOOKS AND PAPERS—CONDITIONS PRECEDENT TO ORDER.**—By reason of the constitutional guaranty against unreasonable seizures and searches, it is a condition precedent to the right of a court, acting under section 1000 of the Code of Civil Procedure, to require a person to deliver up for examination his private books and papers, that such person has a book, paper, or document containing evidence material to the issues before the court, and that the precise book, paper, or document containing such evidence be designated or so described that it may be identified. (Funkenstein v. Superior Court, 663.)
11. **INSUFFICIENT AFFIDAVIT FOR INSPECTION OF BOOKS—CONTEMPT IN REFUSING TO COMPLY WITH ORDER—PROHIBITION.**—Where the affidavit, which is made the basis of an order requiring the defendant in an action to quiet title to permit an inspection of books and documents by the plaintiff, fails to show that the defendant has in his possession any particular book, paper, or document which, if presented at the trial, would be admissible and material evidence for either of the parties to the action, and also fails to sufficiently identify any such book, paper, or document with the particularity required for compliance with the constitutional guaranty against unreasonable searches and seizures, prohibition will issue to prevent the court from punishing the defendant for contempt in refusing to comply with an order of inspection. (Id.)
12. **PROMISSORY NOTE—ACTION TO RECOVER BALANCE—CONFLICTING EVIDENCE—REVIEW ON APPEAL.**—Where the evidence, in an action to recover an alleged unpaid balance on a promissory note, is conflicting, the plaintiff's evidence showing that she was in possession of the note and the defendants' testimony showing that they had paid the balance by an assignment of mining stock to the payee, a decision by the trial court in favor of the defendants will not be disturbed on appeal. (Pratt v. Phelps, 755.)
13. **LETTER—CARBON COPY—FOUNDATION FOR ADMISSION.**—In such case a ruling by the trial court, based upon one of two possible constructions of the evidence, that a letter written by the payee of the note was in reply to a letter written by one of the defendants, and therefore that an alleged carbon copy of the defendant's letter was admissible in evidence, will not be disturbed on appeal. (Id.)

EVIDENCE (Continued).

14. **SECONDARY EVIDENCE—CONTENTS OF LOST LETTER.**—If a letter, claimed to have been written by one of the defendants to the payee of such note, is shown to have been lost, it is proper to admit evidence of its contents. (Id.)
15. **WEIGHT OF EVIDENCE—CONSIDERATION ON APPEAL.**—Primarily the weight of the evidence in every case is a matter for the consideration of the trial court, and ordinarily cannot be considered upon appeal. (Id.)

See Accord and Satisfaction, 12; Appeal, 1-4, 7-9, 12, 15; Brokers, 1, 2, 7, 11, 12; Criminal Law, 8-17, 19, 24, 25, 29, 33, 34, 41-47, 49-52, 55-58, 70-75, 81, 82, 87-96, 98-109, 111-122, 129, 131-134, 136-138; Damages, 4; Deposition; Divorce, 8; Guaranty, 10; Husband and Wife, 3-5; Insurance, 5, 7; Municipal Corporations, 1; Negligence, 1, 5, 21, 24, 25, 29-31, 37; New Trial, 5; Partition, 1; Sale, 3, 4; Wills, 1, 2.

EXCHANGE. See Brokers, 3, 4; Damages.

EXECUTION. See Corporations, 22.

EXECUTORS AND ADMINISTRATORS. See Estates of Deceased Persons.

FALSE PRETENSES. See Criminal Law, 39, 40.

FINDINGS.

1. **FINDING ON MATERIAL ISSUE—FAILURE TO MAKE.**—A failure to find on a material issue demands a reversal of the case, and a judgment based upon findings which do not determine all the material issues is a decision against law. (*Emirzian v. Asato*, 251.)
2. **SPECIAL FINDINGS—INCONSISTENCY WITH GENERAL VERDICT.**—Where special findings are not only inconsistent with themselves, but irreconcilable with the general verdict, this is ground for reversal. (*McEwen v. New York Life Insurance Co.*, 694.)

See Appeal, 9, 15, 25; Conversion; Divorce, 9, 13, 14; Partition, 1.

FORCIBLE ENTRY AND DETAINER.

1. **PLEADING—INSUFFICIENCY OF ANSWER TO TENDER ISSUE.**—Where the complaint in an action for forcible entry and unlawful detainer alleges that on a certain date the plaintiff was in the peaceable possession of certain land, and that on that date the defendant, forcibly, unlawfully, and wrongfully entered upon and has since retained possession of the premises, and the answer admits the taking and holding of such possession, but denies that the defendant did so "forcibly, unlawfully or wrongfully," these adverbial forms

FORCIBLE ENTRY AND DETAINER (

of denial are not sufficient to tender an
or legality of the defendant's entry.

2. **PRIOR PEACEABLE POSSESSION OF**
UPON WANT OF INFORMATION AND B
of information and belief, of the ave
possession of the plaintiff, is insuffi
action for forcible entry and unlawful
notice and put upon inquiry as to th
possession in and to the property he
action predicate his denial of the
possession upon his want of informati

3. **ENTRY UNDER CLAIM OF RIGHT—AN**
ING.—An allegation in the answer in s
bought the pasture upon the premises
names, but does not show to have had
or any right to dispose of its pasture
entry upon any sufficient claim of righ

FORFEITURES. See Corporations, 13, 14

FORGERY. See Criminal Law, 29–32.

GARNISHMENT.

1. **ACTION AGAINST GARNISHEE—EVIDENCE**
AT TIME OF GARNISHMENT.—In this a
against a garnishee, on the ground tha
was levied there was sufficient money i
due the judgment debtor to meet the
evidence shows there was nothing tl
(Aigeltinger Company v. Healy-Tibb
608.)
2. **TEST OF RIGHT OF GARNISHMENT—EXI**
The true test of the right to maintai
the right of the defendant to sue t
the attachment. (Id.)

GUARANTY.

1. **CORPORATIONS—SALE OF STOCK—GUAR**
CASE OF DISSATISFACTION.—Where a
chaser of corporate stock to refund
twelve months from date, in the eve
with your investment," an expression
mand for the fulfillment of the guaran
during the life of the agreement, and
before the last day of the life of the
Co. v. Oliver, 318.)

GUARANTY (Continued).

2. **ASSIGNMENT OF GUARANTY—VALIDITY AND EFFECT.**—An assignment of the guaranty by the obligee, prior to the last day fixed in the demand for refunding the money, is valid; it operates to authorize the assignee to collect the same when it becomes due and payable. (Id.)
3. **ASSIGNABILITY OF GUARANTY—RATIFICATION OF ASSIGNMENT.**—Such a guaranty is assignable, and if it were not, its assignment could be ratified by the guarantor, with notice of the assignment, agreeing with the assignee to pay an amount agreed to be due under the contract. (Id.)
4. **CONTRACT—WHETHER THAT OF CORPORATION OR OF ITS PRESIDENT.**—The fact that the guarantor in signing the contract adds the word "President" after his signature does not make the contract the obligation of the corporation of which he is president, nor does the use of the letterhead of the corporation carry any such presumption. (Id.)
5. **RETURN OF STOCK ON PAYMENT OF MONEY—JUDGMENT—APPEAL.**—The failure to provide in the judgment, in an action on the guaranty for the return of the money, that the stock must be returned on payment of the judgment, cannot be objected to on appeal, where the complaint in the action contemplates that upon payment the stock shall be returned to the defendant, and he, neither in his answer nor in any other way, indicated that he was not satisfied to let the case go to trial and judgment resting on that assumption. (Id.)
6. **GUARANTY OF LEASE—ACTION TO ENFORCE—LESSEE NOT NECESSARY PARTY.**—In an action by the lessor on a guaranty of a lease, the lessee, who is insolvent, is not a necessary party defendant. (Boschetti v. Morton, 325.)
7. **PLEADING—REDUNDANT MATTER IN COMPLAINT—REFUSAL TO STRIKE OUT.**—In such action the refusal of the court to strike out redundant matter in the complaint setting forth proceedings to recover rent in the justice's court, is not ground for a reversal of the judgment, it not appearing that defendants were in any wise prejudiced by the redundancy. (Id.)
8. **AMENDED ANSWER ALLEGING PENDENCY OF ANOTHER ACTION—REFUSAL OF LEAVE TO FILE.**—It is not error in such action to refuse leave to file an amended answer, setting forth by way of plea of abatement the pendency of another action between the lessee and the plaintiffs here to recover damages for the defective construction of the building and the consequent injury to goods, where the guarantor is not a party to such action. (Id.)
9. **EXECUTION OF LEASE AND GUARANTY—SUFFICIENCY OF PROOF.**—In this action on a guaranty of a lease the execution of the lease and

GUARANTY (Continued).

the guaranty appeared both by failure of the answer and the complaint in in

10. **ACTION ON GUARANTY OF LEASE—EVICTION.**—Material to show that the plaintiffs acceded from the lessee, and that their nonpayment of the rent. (Id.)
11. **SURRENDER OF PREMISES BY LESSEE.**—Upon the surrender of the key and abate a lessee during the term, the lessors held and thus manifest their acceptance of the key and thus manifest their acceptance of the key held to have evicted the lessee and abate rent. (Id.)
12. **EVICTON OF LESSEE—WHAT IS NOT—RENT.**—Where a tenant, not under contract up the premises and the landlord accepted no eviction, and guarantors of the leaseability for rent. (Id.)
13. **DEFAULT OF LESSEE—NECESSITY OF NOTICE.**—Who guarantees the payment of rent upon notice within reasonable time of the lease. (Id.)

HABEAS CORPUS. See Juvenile Court.

HIGHWAYS. See Streets, Roads, and Highways.

HOLIDAY.

1. **JUSTICE'S COURT—APPEAL TO SUPERIOR COURT—UNDERTAKING—EXPIRATION ON SATURDAY.**—Filing an undertaking on an appeal from a judgment on Saturday, which from 12 o'clock noon on Saturday to the Monday following is taken, cannot entertain jurisdiction of the Court of Los Angeles County, 670.)
2. **HOLIDAYS—EFFECT OF STATUTE DEFEATING A HALF HOLIDAY.**—The effect of the statute providing that a half holiday is to be observed from 12 o'clock noon to 12 o'clock noon of that day during which an act may be done. Up to noon Saturday is any day other than those designated in the Civil Procedure as holidays, and the time which ends at noon does not extend the time where the time therefor expires on Sunday.

HUSBAND AND WIFE.

1. **DESERTION—ACTION FOR MAINTENANCE.**—In this action by a married woman for separate maintenance, the evidence is sufficient to show that her husband, after being informed that she was suffering from consumption, left her and resolved to live with her no more. (*Murdough v. Murdough*, 179.)
2. **SEPARATE MAINTENANCE—AMOUNT OF ALLOWANCE.**—If it appears in such case that the husband has a net income of one hundred dollars a month, an award to the wife of forty dollars a month for her separate maintenance will not be disturbed on appeal. (*Id.*)
3. **CONVEYANCE OF PROPERTY TO BOTH—PRESUMPTION OF TENANCY IN COMMON.**—While it is true that the presumption established by section 164 of the Civil Code, that a married woman takes the part of property conveyed to her and her husband as tenant in common unless a different intention is expressed in the instrument, is not conclusive and may be disputed and overthrown by other testimony, nevertheless the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overcome by other testimony. (*Volquards v. Myers*, 500.)
4. **DISPUTABLE PRESUMPTION—SUFFICIENCY OF EVIDENCE TO OVERCOME—REVIEW ON APPEAL.**—Whether or not, in any case, a disputable presumption has been dispelled by testimony received in rebuttal thereof, is a question whose solution is solely with the trier of the facts, and while a trial court or jury cannot arbitrarily accept a disputable presumption as against other testimony received in direct opposition thereto, yet, unless it is clearly and unmistakably made to appear that an arbitrary course in that regard has been followed by the trial court or jury, it does not rest within the legal power or right of an appellate court to say that the presumption should have been rejected as having been dispelled by the evidence set up against it. (*Id.*)
5. **PRESUMPTION THAT WIFE HOLDS AS TENANT IN COMMON—INSUFFICIENCY OF HUSBAND'S TESTIMONY TO OVERTHROW.**—In this action by a husband against the executor of the will of his deceased wife to establish his claim of sole ownership to real estate conveyed to him and to her during her lifetime, the trial court did not abuse its discretion in holding that the testimony of the husband that he purchased the property with his separate money and gave his wife no interest therein was not sufficient to overcome the presumption that she was owner of an undivided one-half interest in the property. (*Id.*)

See Divorce; Wills, 5.

INCEST. See Criminal Law, 34.

INDORSEMENT. See Criminal Law, 30, 31.

INHERITANCE TAX.

1. **DEATH OF DEVISEE SUBJECT TO TAX—COMPUTATION OF SECOND TAX.**
Where a testator dies leaving his estate to a devisee who is subject to an inheritance tax, and the devisee then dies leaving an estate the residuary devisees of which are also subject to an inheritance tax, the first inheritance tax is to be deducted from the amount of the second estate, in computing the second tax. (Estate of Williams, 285.)
2. **DETERMINATION OF VALUE OF ESTATE—DEDUCTION OF LIENS AND DEBTS.**—In making his appraisement of the market value of devised or inherited property an inheritance tax appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it. (Id.)
3. **TAX IMPOSED ONLY UPON SO MUCH PROPERTY AS COMES TO DISTRIBUTEE.**—The inheritance tax is imposed solely upon the devisee, legatee, or heir, and upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. (Id.)

INJUNCTION. See Appeal, 18, 19; Landlord and Tenant, 5; Street Assessment, 5; Streets, Roads, and Highways, 3; Water and Water-rights, 14.

INSANITY. See Criminal Law, 63, 65.

INSOLVENCY. See Corporations, 21-25.

INSTRUCTION. See Appeal, 10; Criminal Law, 7, 14, 53, 54, 63-66, 76, 77, 83-87, 93-95, 97, 105-108, 131, 132; Evidence, 9; Insurance, 3, 4; Negligence, 5-8, 15-18, 23, 26, 27, 29, 30, 36, 37, 42.

INSTRUMENT See Criminal Law, 26-28, 36, 37.

INSURANCE.

1. **LIFE INSURANCE—REPRESENTATIONS IN APPLICATION—STATEMENTS AS TO PRIOR AILMENTS AND ACCIDENTS—WHETHER SUBSTANTIALLY TRUE.**—Where an applicant for life insurance, in reply to the question, "What illnesses, diseases, or accidents have you had since childhood?" answers "typhoid pneumonia," whereas he was once struck by a mule as a result of which one rib was fractured, causing the spitting of purulent matter and totally disabling him for a period of nearly four months, followed by partial disability for a longer period, such answer is not "substantially true," and it was error for the court in instructing the jury on this point to use the expression "substantially true," without defining it, where it

INSURANCE (Continued).

appears that the jury misunderstood the term in that they found the applicant's representation substantially true. (*McEwen v. New York Life Insurance Company*, 694.)

2. **REPRESENTATIONS BY INSURED—"SUBSTANTIALLY TRUE"—MEANING OF WORDS.**—"Substantially true" does not mean somewhat true, partially true, on the one hand; nor does it mean true in every possible and immaterial respect, on the other. It means true, without qualification, in all respects material to the risk. (*Id.*)
3. **SUBMITTING SPECIAL INTERROGATORIES TO JURY—FORM OF QUESTIONS.**—Questions propounded to the jury as to such representations, upon which they were requested to render special verdicts, in an action on the policy, should have been whether or not the answers so given were true; or, if the term "substantially true" were employed, the court should have instructed the jury as to the meaning of those words. (*Id.*)
4. **MATERIALITY OF REPRESENTATIONS—WHETHER QUESTION FOR JURY OR FOR COURT.**—In such action it was error for the court to submit to the jury the question whether the representations so made were material, and in effect that, notwithstanding the fact that they might find the answers and representations to be untrue, they should, nevertheless, render a verdict in favor of the plaintiff, unless they found that such representations were material. Where the materiality of the representations depends upon inferences drawn from facts and circumstances proved, the question is one for a jury. A different rule, however, applies where the representations are in the form of written answers made to written questions. In such case the parties, by putting and answering the questions, have indicated that they deemed the matter to be material. (*Id.*)
5. **MISREPRESENTATIONS BY INSURED—ADMISSIBILITY OF EVIDENCE TO SHOW.**—Declarations made by an insured person, inconsistent with statements which he made in his application as to prior ailments and accidents, are admissible against his beneficiary in an action by the latter on the policy, where the policy expressly reserved the right in the insured to change his beneficiary. (*Id.*)
6. **VESTED INTEREST OF BENEFICIARY—WHEN DOES NOT EXIST.**—Where a policy of life insurance reserves to the insured the right to change his beneficiary, the beneficiary has no vested interest during the lifetime of the insured. (*Id.*)
7. **MARINE INSURANCE—DREDGE IN TOW OF TUG—ORAL EVIDENCE THAT INSURANCE COVERS BARGES.**—A policy of marine insurance which undertakes specifically to insure the dredge "San Francisco" in tow of the tug "Sea Rover," from San Francisco to San Pedro, and which by its terms is silent as to any barge to accompany the dredge, may be shown by oral evidence to cover the towing of two

INSURANCE (Continued).

barges attached to the dredge. (Calif v. New Zealand Insurance Company, 61

8. CONCEALMENT BY INSURED—REMEDIES that the two barges made a part of the insurer, he may rely upon such concealment in an action thereon by the insurer as the exclusive remedy of one who has been deceived by reason of acts or omissions of which the insurer is fraudulent in their nature; he may seek rescission, or he may seek affirmative relief for any injury sustained by the wrongdoer, or he may set up the fraud by which the policy was brought to enforce the apparent liability.
9. MATTERS MATERIAL TO RISK—LENGTH OF TIME INSURED.—The fact that barges, increased two or three times, are to be attached to a tug upon the ocean in the winter time, increasing the risk of the voyage, and a fact which the insurer is sufficient to avoid a policy of insurance.
10. FAILURE TO READ POLICY—RIGHT TO REFUSE TO APPLY.—One who procures a policy to rely on the presumption that the policy conforms with the facts disclosed in the application, and a failure to read the policy will not relieve the insurer from liability to make the policy conform to the facts. (Id.)
11. CONCEALMENT OF FACTS BY BROKER—INSURER.—Where the owner of a barge employs brokers to obtain insurance on it during the voyage, and gives them the facts material to the risk, and the brokers give the facts to a firm of general agents, and the firm gives them the information they have relative to the risk, but the latter agents do not give the entire risk with their company, but refer it to another company, in accordance with the insurance agents, a policy issued by the latter company, because such latter agents did not communicate the facts which had been given to them. (Id.)

INTEREST.

ALLOWANCE ON UNLIQUIDATED CLAIM BEFORE JUDGMENT.—On an implied contract to pay the reasonable interest is not allowable before judgment; and the judgment will be modified to the extent of the interest. *Shants Collection Agency v. Gopcevic*,

INTERPRETER. See Criminal Law, 74, 75.

INTOXICATING LIQUORS.

1. **POWER OF MUNICIPALITY TO PROHIBIT SALE—SOLICITATION OF ORDERS—PLACE OF DELIVERY.**—The legislative authority of a municipality or political subdivision of the state cannot enforce penalties against persons soliciting orders within its jurisdiction for intoxicating liquors, in cases where such liquors are to be delivered outside the limits of such subdivision. (*Golden & Company v. Justice's Court of Woodland Township*, 778.)
2. **WYLLIE LOCAL OPTION LAW—SOLICITATION OF ORDERS—PLACE OF SALE OR DELIVERY.**—Section 15 of the Wyllie Local Option Law (Stats. 1911, p. 599), which makes it unlawful for any persons "within no-license territory to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors," cannot be invoked by a municipality to prohibit the solicitation or taking of orders within its limits for the sale or delivery of such liquors without its boundaries. (*Id.*)
3. **SALE OF LIQUOR—COMPLAINT CHARGING—JURISDICTION OF JUSTICE'S COURT.**—A complaint which, in the language of the statute, charges the solicitation of orders for the sale of intoxicating liquors within "no-license territory," is sufficient to give a justice's court, acting as a magistrate's court, authority to preliminarily examine and pass upon the charge, although it does not directly appear from or upon the face of the complaint whether the liquor was to be delivered within or without the territory. (*Id.*)
4. **ORDER FOR SALE OF LIQUOR—MANNER OF TAKING.**—Section 15 of the Wyllie Act, which makes it unlawful for any person, company, association, or club, within no-license territory, to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors, does not contemplate that the prohibited solicitation must be carried on within such territory in person by a party or his agent. Such section was intended by the legislature to prevent, if possible, or to penalize, if committed, the solicitation of orders, the taking of orders or the making of agreements within no-license territory for the sale or delivery of intoxicating liquors in such territory, irrespective of the manner in which such acts might be accomplished. (*Id.*)
5. **PERSONAL SOLICITATION OF ORDERS UNNECESSARY—TAKING OF ORDERS BY MAIL.**—One who solicits orders or makes agreements through the instrumentality of letters, sent to the addresses in no-license territory of persons residing or being therein, thus brings himself as clearly under the ban of the statute as if he were to prosecute such solicitation or make such agreements in person within the boundaries of such territory. (*Id.*)

INTOXICATING LIQUORS (Continued).

6. **INTERPRETATION OF STATUTE—PURPOSE**
statute must be construed with reference to the purpose to be accomplished by it; and in order to determine if it is proper to consider the occasion and the occasion (Id.)
7. **GRAMMATICAL CONSTRUCTION OF STATUTE REJECTED.**—Where a statute may be given a construction leading to a result in manifest opposition to the object or in circumvention of its paramount object, it shall be rejected and one adopted which will best effect the object designed by the legislature to be accomplished (Id.)
8. **LIQUOR FOR HOUSEHOLD USE—SOLICITATION**
The act of soliciting orders from individuals for the sale of liquor was intended to be and is enjoined by the act.
9. **SALE OF LIQUOR—PLACE OF CONSUMPTION**
The place of consumption is not important, so far as concerns either the sale or that of making agreements for the sale, whether the sale contemplated by such agreement is consummated outside of the territory or within. The offense of soliciting orders or the sale of intoxicants within such territory is in violation of the agreements with the purpose of the act to prohibit liquors therein. (Id.)
10. **MANNER OF TAKING ORDERS FOR LIQUOR**
The Wyllie Act is intended to prevent the solicitation, whatever may be its form, by letter or other like communications from within no-license territory through messengers and addressed to persons such as druggists, pharmacists, at their residences or places of business.
11. **DISTINCTION BETWEEN SOLICITING ORDERS AND PAPER ADVERTISEMENT.**—There is a distinction between the solicitation of orders by means of letters or mail to particular individuals in no-license territory and the circulation in such territory of newspaper advertisements extolling the quality and giving the price of liquor. In the first case the minds of the public are addressed upon a single subject and called to the subject matter of the advertisement. In the other no particular person is appealed to, but various matters which are usually read in the paper through the medium of the advertisement are of general circulation. (Id.)

INTOXICATING LIQUORS (Continued).

12. WORDS AND PHRASES—MEANING OF WORD "SOLICIT."—The word "solicit" implies personal petition and importunity addressed to a particular individual to do some particular thing, and it is unquestionably in this sense that the term is used in the Wyllie Act. (Id.)
13. SOLICITING ORDERS FOR LIQUOR BY MAIL—VENUE OF OFFENSE.—The solicitation of orders for liquor by mail in no-license territory is complete upon the receipt of the letter by the person to whom it is addressed, and the venue of the offense is in that county. (Id.)
14. WYLLIE ACT—SOLICITATION OF ORDERS FOR LIQUOR IN NO-LICENSE TERRITORY.—The application for a writ of prohibition is denied in this case on the authority of *Golden & Company v. Justice's Court of Woodland Township*, ante, p. 778. (*Golden & Company v. Justice's Court of Guinda Township*, 802.)

IRRIGATION. See Water and Water-rights, 1-4.

JUDGMENT.

1. INCORRECT ENTRY—AMENDMENT NUNC PRO TUNC.—In a case where it is made to appear that the entry in the minutes does not correctly embody the judgment given by the court, it is a familiar rule that the court may at any time amend the judgment *nunc pro tunc* to make the entry conform to the true judgment. (*Kowalsky v. Nicholson*, 160.)
2. AMENDMENT OF ORDER INADVERTENTLY MADE AND ENTERED.—The power of courts to amend their judgments is not wholly confined to such cases; it extends also to cases where, as here, the order was inadvertently made and entered. (Id.)
3. REPLEVIN—CORRECTION OF JUDGMENT NUNC PRO TUNC.—Where the plaintiff in claim and delivery has secured possession of the property, and the defendant obtains a dismissal of the action for want of prosecution, the order of dismissal, if it inadvertently omits to direct the return of the property, may be corrected by the court *nunc pro tunc*. (Id.)
4. ACTION FOR INSTALLMENTS OF RENT—EXPRESS LIMITATION AS TO QUESTIONS DETERMINED—JUDGMENT AS BAR TO SUBSEQUENT ACTION.—Where, in an action to recover installments of money in the nature of rent, the court determines the cause with reference to the installments that were matured when the complaint was filed and expressly declines to find as to any subsequent installment, the judgment is not a bar to a subsequent action for later installments. (*Jacoby v. Peck*, 363.)
5. CONCLUSIVENESS OF JUDGMENT—MATTERS THAT MIGHT HAVE BEEN LITIGATED.—The rule that a judgment is final and conclusive between the parties not only as to matters actually determined, but

JUDGMENT (Continued).

as to every matter which the parties might have litigated and have decided as incident to or essentially connected with the subject matter of the litigation within the purview of the original action, cannot properly be invoked as to an issue which affirmatively appears not to have been determined by the judgment; as to that issue there is no judgment, and necessarily there can be no estoppel by something that does not exist. (Id.)

6. **OPENING DEFAULT—DISCRETION OF COURT—REVIEW ON APPEAL.**—The action of a trial court, upon an application to set aside a default and grant relief from the judgment based thereon, rests so largely in the discretion of that court that its action in refusing to grant the application will not be disturbed on appeal, unless the record clearly shows that such discretion has been abused. (Brown v. Martin, 736.)

7. **RELIEF FROM DEFAULT—LIBERALITY OF PRACTICE UNDER SECTION 473 OF THE CODE OF CIVIL PROCEDURE.**—Trial courts should be liberal in the application of the remedial provisions of section 473 of the Code of Civil Procedure to litigants in default, to the end that causes may be presented and tried upon their merits; and where the parties in default have appeared promptly, apparently in good faith, and have tendered proper pleadings, raising issues going to the merits of the action, applications to set aside their default arising from their excusable neglect ought to be granted. (Id.)

8. **DEFAULT AGAINST FOREIGNER—REFUSAL TO OPEN—ABSENCE OF DEFENSE ON MERITS.**—It is not an abuse of discretion to refuse to set aside a default in an action for forcible entry and unlawful detainer, notwithstanding the defendant is a foreigner without ability to read or write English and appears promptly and shows that his default occurred through his ignorance of the importance of the precise date of service of process upon him, where there is no showing that he possesses or pleads a sufficient defense to the action upon the merits. (Id.)

9. **DEFAULT JUDGMENT—RELIEF FROM AFTER SATISFACTION.**—The fact that a default judgment is satisfied before application is made to set aside the default does not bar the remedy. (Id.)

See Appeal, 1, 2, 6, 11, 13, 14, 16, 20-23, 25, 30; Corporation, 9, 10; Damages, 2; Eminent Domain; Guaranty, 5; Interest; Surety.

JURISDICTION. See Appeal, 22; Divorce, 10; Juvenile Court; Municipal Corporations, 1, 2; State Lands.

JURY AND JURORS. See Criminal Law, 112-114.

JUSTICE'S COURT. See Appeal, 27-29; Holiday.

JUVENILE COURT.**COMMITMENT OF DEPENDENT MINOR—ABSENCE OF JURISDICTION—**

HABEAS CORPUS.—Where a petition, praying that a minor be taken into custody as a dependent child, fails to state any of the facts required by statute to constitute the child a dependent, an order of the juvenile court committing him to the custody of the probation officer is without jurisdiction and the child will be released on *habeas corpus*. (Matter of Burner, 637.)

LANDLORD AND TENANT.

1. **DESTRUCTION OF PREMISES—LIABILITY FOR RENT.**—One who contracts with the lessees of certain premises to pay them a stipulated sum monthly for the remainder of their term in consideration of their transferring their interest to the owners of the property, and securing from them a lease direct to him for which the owners are to receive an additional rental, is released from his obligation to the original lessees on the destruction of the premises by fire prior to the expiration of the term. (Jacoby v. Peck, 183.)
2. **LEASE—FORM OF INSTRUMENT.**—No technical or particular form of words is required in the formulation of a written lease. Whatever words show an intention on the part of the lessor to dispossess himself of the premises, and on the part of the lessee to enter and hold in subordination to the lessor's title, are sufficient. (Morris v. Iden, 388.)
3. **CONTRACT TO CARRY ON DAIRY—WHETHER CONSTITUTES LEASE.**—A written agreement which provides that the second party thereto "is to care for, milk, separate, feed hogs, cows, calves, and do all the work necessary to the success and cleanliness" of a certain dairy located on described land; that the first party "is to furnish all feed necessary to the success of said dairy, and keep on the premises" a certain number of cows, for which he is to receive one-third of the income of the dairy; that "the life of this lease is three years from date"; and that "it is agreed between the first and second parties to this lease that the second party must absolutely care for stock satisfactorily to first party and his failure to do so is a forfeiture on his part," constitutes a lease, rather than a contract of employment. (Id.)
4. **ASSIGNMENT OF LEASE—WHEN PERMISSIBLE.**—Since such instrument is a lease, and not a contract for personal services, the lessee is entitled to assign it if it contains no stipulation against assignment. (Id.)
5. **INJUNCTION AGAINST BREACH BY LESSOR—RIGHT OF LESSEE TO INVOKE.**—If the lessor in such case, when only a little over two months of the term of three years of the tenancy has elapsed, advertises for sale the personal property mentioned in the lease, and thus threatens an act which, in view of the character of the business

LANDLORD AND TENANT (Continued).

- for which the property is to be used, will practically result in terminating the lease and so destroying the rights of the lessee's assignee, the assignee is entitled to the protection of the injunctive jurisdiction of a court of equity. (Id.)
6. **ACTION FOR USE AND OCCUPATION—NECESSITY OF EXISTENCE OF CONTRACTUAL RELATION.**—In an action for use and occupation of real property, the plaintiff is not entitled to recover unless he shows that the conventional relation of landlord and tenant exists. (*Pacific States Corporation v. Arnold*, 672.)
7. **RELATION OF LANDLORD AND TENANT—WHETHER IMPLIED FROM FINDINGS.**—The existence of the relation of landlord and tenant is not to be implied from a finding in such action "that no written or verbal lease was executed by plaintiff to defendant of said premises, but that notice was given by plaintiff to defendant that defendant would be liable for the rental of said premises if he continued to use and occupy the same after May 1, 1911." (Id.)
8. **NOTICE OF LIABILITY FOR RENT—WHETHER SHOWS RELATION OF LANDLORD AND TENANT.**—The fact that the plaintiff gave notice that the defendant would be liable for rent, in the absence of any showing of assent on the part of the defendant, is insufficient to show the existence of any contractual relations between the parties, without which the plaintiff could not prevail in an action to recover rent. (Id.)
9. **CHANGE OF ORIGINAL CONTRACT—ASSIGNMENT OF SUBLETTING—RELEASE OF SURETY OF TENANT.**—Where lessees form a corporation, and the corporation occupies the leased premises and pays rent without obtaining an assignment of the lease, and, financial difficulties overtaking the corporation, the premises are occupied successively by the sheriff, a trustee in bankruptcy, and a purchaser at the trustee's sale, each paying rent on account of the lease, the sureties of the lessee are not thereby released from liability on the theory that the lessor has allowed an assignment or subletting without their consent. (*Henne v. Summers*, 763.)
10. **WRITTEN LEASE—HOW MAY BE ALTERED.**—The lease, being a written contract, could be altered only by a contract in writing or an executed oral agreement. (Id.)
11. **RENT—ACCEPTANCE FROM PERSON IN POSSESSION—RELEASE OF LESSEE AND SURETIES.**—The mere acceptance by the landlord of rent from the various persons in possession did not release the lessees from the covenants contained in the lease nor discharge their sureties. (Id.)
12. **FEES OF ATTORNEY—RECOVERY IN ACTION AGAINST SURETIES.**—Attorney's fees incurred by the lessor on account of the lessees' non-payment of rent and the various changes in occupancy, may be

LANDLORD AND TENANT (Continued).

recovered by the landlord, in his action against the sureties of the lessees, without proving that such fees have actually been paid. (Id.)

13. **LEASE OF PREMISES ON WHICH TO MANUFACTURE NICKEL AND SLOT MACHINES—LAWFULNESS OF ENTERPRISE—CANCELLATION OF LEASE.** A complaint in an action by a lessee for the cancellation of the lease, which alleges that the premises were leased for the purpose of conducting therein the business of manufacturing "coin operating machines, commonly known as nickel-in-the-slot machines," and that by an act of the legislature in the year 1911, the business of manufacturing or having in possession any nickel-in-the-slot machine became unlawful, fails to state a cause of action upon the theory that the subsequently enacted law rendered the terms of the lease impossible of performance. (*Fey v. Rossi Improvement Company*, 766.)
14. **NICKEL-IN-THE SLOT MACHINES—CONSTRUCTION OF SECTION 330a OF PENAL CODE.**—Section 330a of the Penal Code, enacted in 1911, does not prohibit or penalize the manufacture of nickel-in-the-slot machines, but has reference only to such machines when they are intended for gambling purposes, "upon the result of action of which money or other valuable thing is staked or hazarded." (Id.)
15. **WORDS AND PHRASES—MEANING OF NICKEL-IN-THE-SLOT MACHINES.**—The phrase "nickel-in-the-slot machine" ordinarily has reference only to that "numerous class of catch-penny contrivances" which, when a nickel or other small coin is dropped into the slot, will return something of value without any element of chance other than that usually present in ordinary transactions of barter and trade. (Id.)

See Eminent Domain; Lease; Partition, 5.

LARCENY. See Criminal Law, 35-47.

LEASE. See Broker, 1, 8-13; Guaranty, 6-13; Landlord and Tenant.

LICENSE. See Corporation, 13, 14.

LIEN. See Mortgage; Pledge; Vessels.

LIFE INSURANCE. See Insurance, 1-6.

LOCAL OPTION. See Intoxicating Liquors.

LOS ANGELES, City of. See Municipal Corporations, 5-10.

MAINTENANCE. See Husband and Wife, 1, 2.

MANDAMUS. See Costs, 2, 3; Municipal Corporations, 11.

MARINE INSURANCE. See Insurance.

MARRIED WOMAN. See Husband and Wife.

MASTER AND SERVANT. See Negligence, 15-21.

MEASURE OF DAMAGES. See Damages.

MINES AND MINING.

1. **MINES AND MINERALS—LOCATOR OR DISCOVERER—RIGHT TO PROTECTION FROM INTRUSION.**—A locator of a mining claim cannot be deprived of his inchoate rights by the tortious acts of others; nor can an intruder and trespasser initiate any rights which will defeat those of a prior discoverer. (*Gobert v. Butterfield*, 1.)
2. **AMENDMENT OF NOTICE OF LOCATION—DOCTRINE OF RELATION.**—Where the object of amending the notice of a location of a mining claim is to cure obvious defects, and there is no attempt to include new ground, the amended certificate will relate back to the original, notwithstanding intervening locations. (*Id.*)
3. **EXCESSIVE LOCATION—HOW FAR VOIDABLE.**—A location of a mining claim in excess of the statutory limit, where it injures no one when made, if made in good faith, is voidable only as to the excess. (*Id.*)
4. **AMENDMENT OF LOCATION—RIGHT TO MAKE.**—A locator of a mining claim may amend his location, if it can be done without prejudices to the rights of others. (*Id.*)
5. **MARKING OF BOUNDARIES—EFFECT OF SUBSEQUENT OBLITERATION.**—Where a mining claim is once sufficiently marked on the ground, and all necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without his fault. If the evidence shows that the boundaries were originally marked, the fact that the stakes then set cannot in later years be found, raises no presumption against the validity of the original marking. (*Id.*)
6. **TIME FOR MARKING CLAIM.**—A claim may be marked at any time prior to the acquisition of an intervening right, regardless of the question as to whether the time within which such marking was made is reasonable or not. (*Id.*)
7. **ACTION TO DETERMINE TITLE—CONFLICTING BOUNDARIES.**—In this action to determine title to a quartz mining claim the evidence was sufficient to justify the trial court in concluding that the plaintiff had no intention originally of claiming any ground beyond the disputed boundary line, and that his object in amending his location was to take advantage of a discovery made by one who had already in good faith located the ground. (*Id.*)

MISTAKE.**REFORMATION OF CONTRACT—MUTUAL MISTAKE IN OMITTING DATE.—**

Where the court finds in an action wherein one of the counts in the complaint is to have a contract for the purchase and sale of oil land reformed so as to insert the date thereof, finds that the failure to insert the date in the contract was a mutual mistake of the parties, the result of inadvertence and "unconscious forgetfulness," the court is not only warranted but compelled to decree reformation. (*Waratah Oil Co. v. Reward Oil Co.*, 638.)

MONEY HAD AND RECEIVED. See Evidence, 4-6.

MONOPOLIES.

1. **CARTWRIGHT ANTI-TRUST LAW—COMBINATION TO PREVENT BROKER FROM EFFECTING SALE OF LAND—SUFFICIENCY OF COMPLAINT FOR DOUBLE DAMAGES.**—In an action by a real estate broker against the stockholders of a bank for double the amount of damages alleged to have been sustained by him by their acts in preventing him from consummating the sale of certain real property devoted to the growing of wine grapes, a complaint alleging that the defendants combined together, in violation of the Cartwright anti-trust law (Stats. 1907, p. 984; Stats. 1909, p. 953) for the purpose of securing and maintaining a monopoly of the wine industry and of lands suitable to the growing of wine grapes in the state, and that they determined to destroy the plaintiff's business, by reason of his having preferred charges against the bank to obtain its expulsion from a certain real estate board, and that they coerced the bondholders' committee of a certain vineyard corporation, who had employed the plaintiff to sell certain land, to refuse to conclude a sale negotiated by the plaintiff through his agency, does not state a cause of action under the Cartwright Act. (*Krigbaum v. Sbarbaro*, 427.)
2. **CHARACTER OF TRANSACTION—INJURY NOT DIRECTLY RESULTING FROM MONOPOLY.**—It is manifest from the circumstances of the transaction complained of as divulged by the complaint that the injury, if any, sustained by the plaintiff in such transaction did not occur as the direct result of the restrictions in trade or commerce which it is charged are being maintained by the alleged trust or combination, but must have been directly occasioned, if at all, by the wrongful acts either of the trust itself, as a corporate entity, not acting within the scope of the purposes of its organization, or by the defendants, as individuals, combined together, it may be, for that express purpose. (*Id.*)
3. **INTERPRETATION OF CARTWRIGHT ACT—INJURY TO BUSINESS OR PROPERTY.**—Injury in business or property within the contemplation of section 11 of the Cartwright anti-trust law providing that any person injured "in his business or property by any other person or

MONOPOLIES (Continued).

corporation or association or partnership, by reason of anything forbidden or declared to be unlawful" by such act, may recover two-fold damages, arises where the injury has directly resulted from the fact of the existence of the trust, that is, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. One whose business or property has been injured cannot maintain an action under such law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination. (Id.)

4. **ALLEGATIONS AS TO TRUST—MATTERS OF INDUCEMENT.**—The averments in such complaint as to the alleged trust are wholly immaterial to the gist of the complaint,—namely, the wrongful acts whereby the defendants, having combined and conspired together for that purpose, but not as a trust or combination in restraint of trade, caused the committee to break its contract with the plaintiff. At best such averments can be regarded as nothing more than matter of inducement, explanatory to some extent, perhaps, of the gist of the complaint. (Id.)
5. **COMPLAINT—SUFFICIENCY OF STATEMENT OF TORT.**—While such complaint is not good under the anti-trust act, it sufficiently states an actionable wrong against the defendants to fortify the pleading against the force of a general demurrer, and the measure of damages is the actual detriment he has suffered by reason of the wrong. (Id.)
6. **PURCHASER READY AND ABLE—ALLEGATION CONCERNING.**—It is not necessary for the plaintiff in such action to allege that at the time the sale was prevented he had procured a purchaser, ready, willing, and able to purchase for the amount and upon the terms prescribed, where it appears that the only step necessary to the procurement was in concluding the negotiations, that is, in consummating or crystallizing the negotiations into an agreement. (Id.)
7. **EXCLUSIVE RIGHT OF BROKER TO SELL—ALLEGATION REGARDING.**—Nor is it necessary to allege that the plaintiff had the exclusive right to sell the property during the life of his contract, or that the committee in its contract with him did not reserve to itself the right to make a sale within that time. (Id.)

MORTGAGE.

1. **ACTION TO FORECLOSE—STIPULATION AS TO DISPOSITION OF SURPLUS—CONCLUSIVENESS ON APPEAL.**—Where all the defendants in an action to foreclose a mortgage stipulate that all claims (except those of defendants who afterward appeal) to any surplus that may remain after the satisfaction of the mortgage need not be

MORTGAGE (Continued).

disposed of in the present action but should await adjudication in another action pending between the several defendants to determine the extent and priorities of their respective claims to the mortgaged premises, the appealing defendants cannot complain of a provision in the decree of foreclosure requiring the surplus to be deposited with the court to await judgment in the other action pending, nor can they complain of the failure of the lower court to adjudicate the issues presented by the answers of the nonappealing defendants. This is so because of the principle of appellate procedure which denies to a party in a civil action the assertion of a right which he has formally waived, or the advantage of an error in which he has knowingly acquiesced. (*Berkeley Bank of Savings and Trust Company v. Miller*, 315.)

2. **ATTORNEY FEE—POWER OF COURT TO FIND AS TO REASONABLENESS.** In an action to foreclose a mortgage the court has the right to determine, even if no evidence has been adduced on the subject, that the attorney fee provided in the mortgage is reasonable. (*Id.*)
3. **FORECLOSURE OF MORTGAGE—SUBROGATION TO RIGHTS OF PLAINTIFF—SUBSTITUTION OF PARTIES.**—Where one of the defendants in foreclosure proceedings, who claims an interest in the premises subordinate to the mortgage, makes a tender to the plaintiff for the amount due him, together with the costs and counsel fees, which tender is accepted, he is entitled to be subrogated to the interests of the plaintiff, and then properly substituted as the plaintiff in the action. (*Id.*)

MUNICIPAL CORPORATIONS.

1. **PROCEEDING TO INCORPORATE—PETITION OF ELECTORS—AFFIDAVITS AS TO SIGNATURES.**—In proceedings for the incorporation of a city of the sixth class, the affidavit of three qualified electors, filed with the petition, certifying the genuineness of the signatures to the petition, of more than fifty of the qualified electors of the county residing within the proposed limits, is *prima facie* evidence of the requisite number of signers; and if no other evidence is presented to or considered by the board of supervisors, it is bound to determine that it has jurisdiction to make its order, so far as such jurisdiction depends upon the number of qualified electors signing the petition. (*Hoffecker v. Board of Supervisors of Los Angeles County*, 405.)
2. **WRIT OF REVIEW—QUESTIONS THAT MAY BE CONSIDERED.**—In proceedings for a writ to review the action of the board of supervisors in granting such petition, the court cannot take into consideration any facts other than those which would appear in a return by the board showing the record of the proceedings before it; and in this case the return would show that the petition was signed by

MUNICIPAL CORPORATIONS (Continued).

- the requisite number of qualified electors, and therefore the alleged want of jurisdiction upon the ground of defect in number of qualified electors could not be made to appear in this proceeding. (Id.)
3. **NOTICE OF PETITION—PUBLICATION FOR TWO WEEKS.**—The publication of the petition for incorporation, reciting that the same will be presented on September twentieth, in the issues of September thirteenth and twentieth of a weekly newspaper, is a sufficient publication for two weeks, and fulfills the requirements of the statute. (Id.)
4. **PUBLICATION ONCE A WEEK—DAILY OR WEEKLY NEWSPAPER.**—A requirement that a notice be published for a designated number of weeks in some newspaper published in the county is fully satisfied by a publication once each week for the designated number of weeks in a daily newspaper published in the county. The same is true when the newspaper is only of weekly publication. (Id.)
5. **AMENDMENT OF CHARTER—BOARD OF PUBLIC SERVICE COMMISSIONERS—CONSTITUTIONAL LAW.**—The amendments to the freeholders' charter of the city of Los Angeles, creating a board of public service commissioners and giving it control of the revenues derived from the sale of water, are not violative of section 13 of article XI of the constitution, which prohibits the legislature from delegating municipal functions to special commissions. (*Mesmer v. The Board of Public Service Commissioners of the City of Los Angeles*, 578.)
6. **FREEHOLDERS' CHARTER—APPROVAL BY LEGISLATURE—POWER TO CHANGE.**—The legislature has no power to mould or change a freeholders' charter of a city when such instrument is before it for approval. (Id.)
7. **APPROVAL OF FREEHOLDERS' CHARTER BY LEGISLATURE—WHETHER AN EXERCISE OF LAW-MAKING POWER.**—The legislature does not, when it approves by resolution a freeholders' charter for a city, exercise law-making power in the sense intended to be expressed in the prohibitory clause of the constitution, that "the legislature shall not delegate to any special commission, private corporation, company, association, or individual, any power to make, control, appropriate, supervise, or in any way interfere with, any county, city, town, or municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes or assessments, or perform any municipal functions whatever." (Id.)
8. **MUNICIPAL CHARTERS—WHETHER SUPERIOR TO GENERAL STATE LAWS.**—Municipalities are now given the power to draft charters whose provisions, in so far as they refer to municipal affairs, are superior to the general state laws. The legislature cannot enact any law which will repeal or change such charter provisions. (Id.)
9. **PUBLIC SERVICE COMMISSIONERS—POWERS—PURCHASE OF GROUND AND ERECTION OF BUILDING.**—The board of public service commis-

MUNICIPAL CORPORATIONS (Continued).

sioners of the city of Los Angeles has power, under the freeholders' charter, to purchase ground and erect thereon an administrative building for its uses, the cost thereof to be paid from the revenue of the water department. (Id.)

10. CITY INDEBTEDNESS—CONSTITUTIONAL LIMIT.—Section 18 of article XI of the constitution, which forbids a city from incurring any indebtedness exceeding in any one year the income and revenue provided in such year, without the favorable vote of two-thirds of the electors, is not applicable to the board of public service commissioners in carrying on such an undertaking. (Id.)
11. MANDAMUS TO COMPEL COUNTERSIGNING BONDS—VALIDITY OF ELECTION—NONPREJUDICIAL ERROR IN COUNTING BALLOTS.—Where, on appeal by a city clerk from a judgment granting a peremptory writ of mandate commanding him to countersign certain municipal bonds, it appears that, conceding all the appellant claims as to the erroneous rulings of the court in counting the ballots voted for the issuance of the bonds, the election was carried by more than a two-thirds vote of the legal ballots cast, such erroneous rulings could not have affected the result and hence are not prejudicial to the appellant or ground for reversal of the judgment. (City of Hanford v. Williams, 668.)

See Drainage District; Intoxicating Liquors; Street Assessment.

MURDER AND MANSLAUGHTER. See Criminal Law, 48-121.

NAVIGABLE WATERS.

1. TERMINATION OF NAVIGABILITY—SUIT TO QUIET TITLE.—In this action by the city and county of San Francisco to quiet title to land formerly lying in the bed of Mission Creek, and subsequently known as Channel Street, the evidence shows that Mission Creek ceased to be navigable prior to December 27, 1867, the date when the land now owned by the defendant passed from the ownership of San Francisco to the defendant's predecessor in interest, and hence that no right of way over the creek as a navigable stream ever passed to the defendant's predecessors. (City and County of San Francisco v. Main, 86.)
2. NAVIGABILITY OF STREAM—HOW DETERMINED.—Whether or not a stream is navigable is a question of fact, at least in the absence of a legislative declaration as to its navigability, and is determinable by its practical utility for navigation during ordinary stages of water at any particular time. (Id.)

NEGLIGENCE.

1. AUTOMOBILE RACE—INJURY TO SPECTATOR—EVIDENCE.—In this action to recover for personal injuries sustained by a spectator at an automobile race by being struck by one of the cars as it swerved

NEGLIGENCE (Continued).

from its course on the breaking of the steering knuckle, the evidence does not establish that the car was entered in the race by authority of the defendant corporation, or that the driver was its agent or employee, or that he was negligent in managing the car. (*Johnson v. Reliance Automobile Company*, 222.)

2. AUTHORITY OF SECRETARY OF CORPORATION TO ENTER AUTOMOBILE IN RACE.—The secretary of a corporation engaged in selling automobiles has no authority, as such, to use its name in entering cars in races and thereby render it liable for the consequences thereof. (*Id.*)

3. WHAT CONSTITUTES—CIRCUMSTANCES OF CASE.—Negligence is a comparative term, and hence the degree of care which in one case would constitute negligence might in another be deemed the exercise of more than prudence. Of necessity the question presented is nearly always one of fact for the jury to determine from the circumstances surrounding the case. (*Medlin v. Spazier*, 242.)

4. AUTOMOBILE COLLIDING WITH PERSON ALIGHTING FROM STREET-CAR. Where a city ordinance provides that drivers shall not operate their vehicles within four feet of the lowest step of a street-car which is taking on or letting off passengers, a passenger alighting from a car has the right to assume that the ordinance will be observed. She is not required, while in the protected zone, to look up and down the street for approaching vehicles, and if she is struck by an automobile, her failure to so look cannot be urged as contributory negligence in her action for resulting injuries. (*Id.*)

5. WITNESS FALSE IN PART—REFUSAL OF INSTRUCTIONS RESPECTING.—The refusal of the court in such action to instruct the jury at the request of the defendant that a "witness false in one part of his testimony is to be distrusted in others," while erroneous, when witnesses for the plaintiff have testified that the defendant's automobile was running at the time of the accident but witnesses for the defendant have testified that the automobile was standing still, is not reversible error, where it is apparent from the verdict that the jury did not believe the testimony of the defendant's witnesses. (*Id.*)

6. WITNESS FALSE IN PART—IMPORTANCE OF INSTRUCTION CONCERNING.—An instruction that a "witness false in one part of his testimony is to be distrusted in others," belongs to that class of instructions which pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. Hence if not prejudicial to the case of the complaining party, neither the giving nor the refusing of such instruction will be held ground for reversal. (*Id.*)

7. REFUSAL TO GIVE INSTRUCTIONS COVERED BY OTHER INSTRUCTIONS.—The refusal of the court to give several instructions touching the

NEGLIGENCE (Continued).

- question of contributory negligence, as requested by the defendant, is not error, if they are covered by other instructions given. (Id.)
8. **POSSESSION OF FACULTIES BY PLAINTIFF—REUSAL OF INSTRUCTION REGARDING.**—Instructions to the effect that the defendant had a right to assume that the plaintiff was in full possession of her faculties of sight and hearing, unless he had notice to the contrary, was properly refused, if there was no claim that the plaintiff was not in full possession of such faculties, or that by reason of the want thereof any greater duty devolved upon the defendant. (Id.)
 9. **COLLISION OF AUTOMOBILE WITH REAR END OF WAGON—ABSENCE OF LIGHT AS REQUIRED BY ORDINANCE—ADMISSION BY PLEADING.**—In an action by the owner of an automobile for damages caused to it by its collision with the rear end of a wagon loaded with heavy timbers, the failure of the defendant to deny the existence of the ordinance alleged by the complaint to exist and to require the drivers of vehicles in the night-time to display a white light in front and a red light in the rear, admits the existence of the ordinance and renders proof thereof unnecessary. (Connell v. Harris, 537.)
 10. **DRIVER OF WAGON—WHEN NOT AN INDEPENDENT CONTRACTOR.**—The fact that the owner of the wagon had, at the time of the collision, left the vehicle and turned its possession over to a third person who had contracted to haul the timbers, does not make the latter an independent contractor and relieve the owner from liability on account of the accident, where the owner took part in placing the timbers on the wagon, rode some distance thereon, and assisted in placing the white light on the front of the wagon. (Id.)
 11. **INDEPENDENT CONTRACTOR—NEGLIGENT USE OF PROPERTY—LIABILITY OF OWNER.**—The owner of property is not responsible for negligence in the use of that property by an independent contractor to whose possession it has been surrendered for some lawful purpose. (Id.)
 12. **WHAT CONSTITUTES INDEPENDENT CONTRACTOR—RETENTION OF CONTROL BY EMPLOYER.**—In order to constitute such third person an independent contractor, it is necessary that he shall have control of the manner in which the contract work shall be done and be responsible only for the results of the work. If the employer retains the right to direct the manner in which the work shall be done, the employed person becomes his servant and the employer remains responsible for negligence of the servant. (Id.)
 13. **VIOLATION OF ORDINANCE—NEGLIGENCE PER SE.**—The violator of a local ordinance is guilty of negligence *per se*, if such violation contributes proximately to an accident. (Id.)
 14. **ACTION FOR NEGLIGENCE—ALLEGATION OF CONTRIBUTORY NEGLIGENCE. FINDINGS THAT ALLEGATIONS ARE TRUE—JUDGMENT FOR DEFENDANT.**—Where, in an action against a railroad company for damages

NEGLIGENCE (Continued).

on account of a collision of a freight car with the plaintiff's automobile, the defendant alleges that the injuries sustained by the plaintiff were due to his own negligence, and it is found "that all of the affirmative allegations of the defendant's answer are true," and "that paragraphs 1, 2, 3, 4 and 5" (presumably of the complaint) are true, the defendant is entitled to judgment on the findings. (*Sayre v. San Pedro, Los Angeles & Salt Lake Railroad Company*, 773.)

15. **MASTER AND SERVANT—FALL BY EMPLOYEE FROM WALKING-BEAM OF OIL DERRICK—COLLAPSE OF ROOF—INSTRUCTION AS TO CONTRIBUTORY NEGLIGENCE.**—In this action by an employee for injuries sustained by a fall from a walking-beam on an oil derrick by reason of the collapse of the roof of the derrick, an instruction on the subject of contributory negligence, which refers to a defective condition of the roof but does not directly affirm that the roof was defective or dangerous, is not open to the objection, when construed with other instructions, that it assumes the defective construction and dangerous condition of the roof and thereby invades the province of the jury. (*Ingalls v. Monte Cristo Oil & Development Company*, 652.)
16. **CAPACITY FOR UNDERSTANDING PERIL—INSTRUCTIONS.**—An instruction in such action that the question as to the plaintiff's alleged contributory negligence must be determined in the light of his capacity for understanding the peril, is not erroneous when the evidence shows without conflict that at the time of the accident the plaintiff was in good health and his general faculties as to memory and otherwise were excellent. (*Id.*)
17. **CONTRIBUTORY NEGLIGENCE—INSTRUCTION OMITTING—OTHER INSTRUCTIONS AIDING.**—In such action an instruction to the jury that if they find certain facts, then the plaintiff is entitled to a verdict, is not erroneous because it omits to include the question of contributory negligence, where other instructions are given which fully state the law as to contributory negligence. (*Id.*)
18. **INSTRUCTIONS—CONSIDERATION AS A WHOLE AND NOT SEPARATELY.** Instructions are to be read and considered as a whole, and the fact that, when taken separately, some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed. (*Id.*)
19. **INJURY TO EMPLOYEE—PRESUMPTION OF NEGLIGENCE FROM HAPPENING OF ACCIDENT.**—Where the relation of the parties is that of employer and employee, it is not the universal rule that the happening of the accident is not itself a circumstance tending to show

NEGLIGENCE (Continued).

negligence on the part of the defendant. In this action by an employee for injuries sustained by a fall from a walking-beam on an oil derrick by reason of the collapse of the roof of the derrick, the falling of the roof, when the derrick and apparatus were being used in the ordinary and in a proper way, *prima facie* established negligence, although it appears, from such casual observations as had been made, that no defectiveness or insecurity of the roof or its fastenings had been observed, but it also appears that no recent inspection had been made for the direct purpose of ascertaining whether the derrick was in a safe condition. (Id.)

20. **SAFE APPLIANCES FOR EMPLOYEE—DUTY OF EMPLOYER TO MAINTAIN.**—The employer was not excused by the mere fact that the derrick had been constructed in the usual manner and presumably once was in safe condition; his duty was to use due care to maintain that safe condition and guard against the wear and tear of use or of time alone. (Id.)
21. **EVIDENCE—SUFFICIENCY TO SUSTAIN RECOVERY BY EMPLOYEE FOR PERSONAL INJURIES.**—The evidence in this case tends to show that the plaintiff fell from his place on the walking-beam by reason of being struck by the falling roof; that the roof fell by reason of some defect in its fastening, the exact nature of which defect is not explained; that under the circumstances shown the jury were justified in finding that the plaintiff received his injuries by reason of negligence of the defendant, as charged in the complaint, and without negligence on the part of the plaintiff or his coemployees. (Id.)
22. **ELECTRIC RAILWAY—PASSENGER ALIGHTING FROM CAR—COLLISION WITH CAR ON ANOTHER TRACK—DURATION OF RELATION OF CARRIER AND PASSENGER.**—In an action against an electric railway company for the death of a passenger who, upon alighting from a car, was struck by a car approaching on another track, an instruction that the relation of passenger and carrier did not cease at the moment she alighted from the car, but that it continued until she had a reasonable time and opportunity to leave the premises of the railway company, and that during such time the railway company owed to her the highest degree of care, embodies a correct statement of the law applicable to the case. (*Stadler v. Pacific Electric Ry. Company*, 571.)
22. **SPEED OF CARS—RIGHT AND DUTY OF RAILWAY CONCERNING—PLEADING—INSTRUCTIONS.**—In such action an instruction that "at the place where this accident is shown to have occurred there was no law regulating the speed of cars; the defendant had a right to propel its cars at any rate of speed which was consistent with the exercise of due care in the business of railroading," is not objectionable in that propelling the cars at an unlawful speed was

NEGLIGENCE (Continued).

not an issue tendered by the pleadings, when it is alleged in the complaint that the death of the deceased was the direct and proximate result of "the negligence of defendant in the operation of its electric cars." (Id.)

- 24. UNLAWFUL SPEED OF CAR—ADMISSIBILITY OF ORDINANCE TO SHOW.**—Whether the rate of speed of the car was unlawful was, under the general allegation of negligence, a proper subject for inquiry, under which an ordinance fixing such rate might have been introduced. (Id.)

- 25. PLEADING NEGLIGENCE—GENERAL ALLEGATIONS—EVIDENCE ADMISSIBLE UNDER.**—While the specific acts constituting negligence were not alleged in the complaint, nevertheless, under the general allegation, evidence showing either that the cars were propelled at an unlawful speed contrary to law, or that, in the absence of such law, the rate of speed was such as under the circumstances constituted negligence *per se*, is competent. (Id.)

- 26. DUE CARE—INSTRUCTIONS CONCERNING.**—In the instruction that the "defendant had a right to propel its cars at any rate of speed which was consistent with due care in the business of railroading," the expression "due care" means such degree of care as the defendant owed to the deceased, and this depended upon the conclusion reached by the jury as to whether or not she was, when struck by the car, a passenger of the defendant; if she was, then "due care" was the highest degree of care. (Id.)

- 27. INSTRUCTIONS—USE OF EXPRESSION "BUSINESS OF RAILROADING."**—The words "business of railroading" in such instruction could not refer to the operation of a freight train or to any business included within the term other than the carrying of passengers for hire, when it was alleged in both the complaint and answer that the defendant was at the time of the accident engaged as a common carrier of passengers, and the question at issue was whether the plaintiff's intestate was killed as a result of the defendant's negligence while being transported by the defendant as a passenger. (Id.)

- 28. ELECTRIC RAILWAY—PERSON WALKING BETWEEN TRACKS—COLLISION WITH CAR ON WRONG TRACK—CONTRIBUTORY NEGLIGENCE.**—Where a person who is walking in a public street follows a pathway, used by pedestrians, between the tracks of an interurban electric railway, and, on the approach of a car from the rear, steps upon the south track under the mistaken belief that the car is, according to custom, running on the north track, and is struck by the car, which is running at a high and unusual rate of speed, without blowing the whistle or sounding the bell, he cannot, as a matter of law, be held negligent. (Lawyer v. Los Angeles Pacific Ry. Company, 543.)

NEGLIGENCE (Continued).

29. **ACTION FOR INJURIES—PREPONDERANCE OF EVIDENCE—INSTRUCTION TO JURY.**—An instruction to the jury in an action for the injuries sustained by such pedestrian that "the affirmative of the issue must be proved, and when the evidence is contradictory the decision must be made according to the preponderance of evidence. The weight of evidence, or preponderance of probability, is sufficient to establish a fact in a civil case, and this is a civil case," is not erroneous in stating that the preponderance of probability is sufficient to establish a fact in a civil case. (Id.)
30. **EVIDENCE—POWER TO PRODUCE MORE SATISFACTORY PROOFS—ERRONEOUS INSTRUCTION—HARMLESS ERROR.**—In such action an instruction to the jury that "the evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is within the power of one side to produce and of the other to contradict, and therefore if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust," though erroneous, when there is no showing that the party against whom it is directed has failed to produce his strongest evidence, does not affect his substantial rights. (Id.)
31. **SOUNDING OF BELL OR WHISTLE—QUESTIONS TO WITNESS REGARDING.**—Where a witness in such an action, who was on the car, testifies that she heard no sound of bell or whistle as the car approached the place of collision, it is proper to ask her if there was anything to prevent her from hearing such sound if it had been made. (Id.)
32. **ELECTRIC RAILWAY—CAR STRIKING CHILD ON TRACK—ABILITY OF MOTORMAN TO AVOID ACCIDENT.**—In this action against a railway company for the death of a child who wandered on the track and was there struck by an electric car, it cannot be said that the jury was not justified in adopting the theory that the motorman saw, or by the exercise of ordinary care could have seen, the child in time to avoid the accident. (*Waterman v. Visalia Electric Railroad Company*, 350.)
33. **NEGLIGENCE OF MOTHER OF CHILD—QUESTION FOR JURY.**—Whether the mother of the child was guilty of contributory negligence in allowing it to be out of her sight fifteen minutes and wandering on the railway track, during which time she was busy with her household duties, is a debatable question and concluded by the finding of the jury; the jury was not bound to find that contributory negligence must be imputed to her. (Id.)
34. **FAILURE OF MOTORMAN TO SEE CHILD—GROSS NEGLIGENCE.**—If through carelessness the motorman failed to observe the perilous position of the child in time to prevent the injury, he was properly chargeable with gross negligence. (Id.)

NEGLIGENCE (Continued).

35. **LAST CLEAR CHANCE—NECESSITY OF ACTUAL KNOWLEDGE OF DANGER.**—Liability under the doctrine of last clear chance is based on the fact that the defendant actually knew of the danger, not on the theory that he should, or by the exercise of ordinary care could, have discovered the peril. Hence it was error to instruct the jury that, while they believed the mother of the child to be chargeable with contributory negligence, they would still be justified in finding a verdict for the plaintiff if it was believed that the motorman, by the exercise of ordinary care, could have seen the child in time to avoid the accident. (Id.)
36. **DEFECTIVE BRAKES—INSTRUCTIONS ELIMINATING. CONTRIBUTORY NEGLIGENCE.**—If the plaintiff based the action on the negligence of the defendant in not equipping the car with suitable brakes, as well as on the carelessness of the motorman, it was error to so instruct the jury as to justify a verdict for the plaintiff on the theory that with suitable brakes the accident might have been prevented, since the doctrine of contributory negligence was thereby nullified. (Id.)
37. **EVIDENCE AS TO CONDITION OF BRAKES—INSTRUCTIONS.**—The only reasonable inference from the evidence is that the brakes worked properly. Therefore the court should have given this instruction proposed by the defendant: "I instruct you that there is no evidence in this case to the effect that the brakes in defendant's car were inadequate or that defendant was negligent in respect to the braking equipment of said car or the condition thereof," (Id.)
38. **STREET-RAILWAY—PASSENGER ATTEMPTING TO ALIGHT FROM MOVING CAR—CONTRIBUTORY NEGLIGENCE.**—Where a passenger on a street-car attempts, without notifying the conductor, to alight while the car is in motion, acting upon the assumption that because the speed of the car has been slackened it will stop at the next crossing, the negligence of the passenger precludes her from recovering from the railway company for injuries received by falling to the ground at the time of an alleged sudden jerk or lurch of the car. (*Dougherty v. Union Traction Company*, 17.)
39. **SLACKENING OF SPEED OF CAR—ASSUMPTION THAT IT WILL STOP.**—It is not for a passenger, desiring to alight from a street-car at a particular place, but not having notified the conductor of such desire, to assume, and to act upon such assumption, that merely because the speed at which the car has been traveling has been diminished for some reason, it is to be stopped at the next street crossing, especially where such crossing is not one where the cars are required to stop in any event but only on signal. (Id.)
40. **PASSENGER ARISING WHILE CAR IS IN MOTION—CONTRIBUTORY NEGLIGENCE.**—For a passenger to arise from his seat, preparatory to leaving the car, while it is still in motion, raises no presumption

NEGLIGENCE (Continued).

of negligence on his part, or, in other words, is not negligence *per se*; but when a passenger arises from his seat in a moving car for any purpose, he must exercise a reasonable or proper degree of care to protect himself from falling off the car, or, if he is inside, from falling against any object properly in the car, otherwise any injuries he may thus sustain will legally be imputed directly to his own negligence. (Id.)

41. CONDUCTOR—DUTY TOWARD PASSENGERS WHILE COLLECTING FARES.

When a street-car conductor is collecting fares, he is not to be expected to perform the impossible act of watching or keeping his eyes on all the passengers in the car, and there is, therefore, some responsibility very justly cast upon the passengers themselves to look out for their own safety, and before attempting to leave a moving car, or when preparing to do so, to notify the conductor in some proper manner of their desire to alight. (Id.)

42. REMARKS AND INSTRUCTIONS OF COURT—WHEN NOT PREJUDICIAL—

If the case is one which the court should take from the jury, because the personal injuries for which the plaintiff is suing were due to her own and not to the defendant's negligence, errors in the matter of the court's instructions and remarks are not prejudicial to the plaintiff. (Id.)

NEGOTIABLE INSTRUMENTS. See Certificate of Deposit; Promissory Note.

NEW TRIAL.

1. NEW TRIAL ON GROUND OF IMPROPER REMARKS OF COURT—REVIEW

ON APPEAL.—Where the affidavits of the plaintiffs on their motion for a new trial on the ground of improper remarks by the court in the presence of the jury, are contradicted by the affidavits of ten of the jurors that they heard no such remarks, and the affidavit of the judge that he did not make them within the hearing of the jury, the decision of the trial court on the issue is conclusive on the appellate court. (*Dougherty v. Union Traction Co.*, 17.)

2. OMISSION OF SPECIFICATIONS FROM NOTICE—TIME FOR AMENDMENT.—

The moving party for a new trial is not entitled, thirty-three days after receiving notice of the entry of judgment and twenty-one days after filing and serving his notice of intention to move for a new trial, to amend his notice of intention by supplying specifications of the particulars in which the evidence is alleged to be insufficient, and also specification of errors of law upon which he will rely, both of which specifications were entirely omitted from his original notice. (*Strange v. Strange*, 281.)

3. MOTION FOR NEW TRIAL—OMISSION OF SPECIFICATIONS AS TO INSUFFICIENCY OF EVIDENCE.—

A motion for a new trial, based upon a notice which fails to contain any specification of particulars in

NEW TRIAL (Continued).

which the evidence is alleged to be in upon that ground. (Id.)

4. **NOTICE OF MOTION—SPECIFICATION OF OF APPEAL.**—The alternative method of 953a of the Code of Civil Procedure party for a new trial from the necessity of intention the particulars in which he the trial the court has erred in matters
5. **MOTION FOR NEW TRIAL ON GROUND DENCE—TIME FOR FILING AFFIDAVITS.**—trial upon the grounds of accident, such evidence, it is incumbent upon him, within of the service and filing of his notice and file his affidavits in support of the a stipulation or order granting further
6. **MOTION FOR NEW TRIAL—NATURE OF .** A motion for a new trial is in the nature proceeding collateral to the judgment Coleman, 423.)
7. **NOTICE OF MOTION—FAILURE TO FILE 1 TION 473 OF CODE OF CIVIL PROCEDURE.**—file a motion for a new trial is not give trial court has no power, under the terms of Civil Procedure, to relieve the defendant of that failure. (Id.)
8. **APPEAL—ORDER REFUSING NEW TRIAL.** No error can be predicated upon the granting a motion for a new trial, when granted and allowed. And although the want is due solely to an error of the court in this cannot avail a party aggrieved, when upon the record nothing appears upon which the motion is based. (K)
9. **NOTICE OF APPEAL OF NEW TRIAL—F RECORD.**—If notice of the denial of new trial is not served, and the record the papers specified in section 661 of as required by section 952 of that motion for a new trial must be affirmed
10. **DIVORCE—MOTION FOR NEW TRIAL—AGREEMENT—DEFAULT IN PREPARING AND** the co-respondent and the defendant if the defendant shall prepare a statement respective motions for a new trial, but to the agreement and is served with

NEW TRIAL (Continued).

the motion of the defendant alone, the co-respondent is not entitled to rely on the statement of the defendant. The failure of the defendant to carry out the agreement is no ground for relief from the co-respondent's default in preparing and serving a statement. (Id.)

See Appeal, 1-4, 6, 8, 13, 14, 26; Criminal Law, 18, 23, 58, 70, 135.

NOTARY PUBLIC. See Deposition.

OFFICE AND OFFICERS. See Municipal Corporations, 9; Notary Public.

ORDINANCE. See Negligence, 9, 13.

PARENT AND CHILD. See Divorce, 6, 7.

PARKS. See Streets, Roads, and Highways.

PARTIES. See Guaranty, 6; Mortgage, 3.

PARTITION.

1. **IMPROVEMENTS IN LEVELING AND BULKHEADING LAND—FINDINGS CONTRARY TO EVIDENCE.**—In this action for partition of a tract of land wherein the defendant, by way of cross-complaint, sought judgment against the plaintiff for money expended in improving and preserving the common property by leveling and bulkheading it, the findings fixing the cost of such improvements and refusing to allow the defendant anything therefor, are contrary to the evidence, which is not conflicting either as to the necessity for the improvements or their cost. (*Ventre v. Tiscornia*, 598.)
2. **IMPROVEMENTS WITHOUT CONSENT OF COTENANT—LIABILITY TO CONTRIBUTION.**—If in such case the improvements were necessary and the plaintiff shared in the benefits thereof, he is chargeable with his proportion of their cost, though they were made without his consent, express or implied. (Id.)
3. **EQUITABLE CONSIDERATIONS IN ACTION FOR PARTITION—ALLOWANCE FOR IMPROVEMENTS.**—A cotenant, seeking partition of the common property at the hands of a court of equity, will be granted relief only upon the condition that the equitable rights of his co-owner will be respected and protected. Therefore where one tenant in common has, in good faith, with or without the consent of his cotenant, expended money in making permanent improvements which were necessary to the preservation of the common property, partition should not be decreed without first counting the cost of such improvements and making a suitable allowance for them. (Id.)

PARTITION (Continued).

4. **NECESSITY OF IMPROVEMENTS—SHARING IN BENEFITS—ELECTION BY COTENANT.**—If, as appears to be true, the evidence in the present case shows without conflict that the improvements to the common property were necessary to its preservation and enhanced its rental value, then the plaintiff should have been put to his election either to contribute equally to the undisputed cost of the improvements, or else relinquish all claim to a share of the increased rentals resulting therefrom. (Id.)
5. **RELATION OF LANDLORD AND TENANT—TENANT AT WILL.**—The finding of the lower court in this case, relating to the necessity and cost of the improvements in question, cannot be justified upon the theory that the improvements were made by the defendant in the character of an ordinary tenant at will of the plaintiff. The case was not tried, either in whole or in part, upon the theory that the relation of landlord and tenant existed between the parties to the partition; but was heard and determined solely upon the issue of the relative rights of the parties as tenants in common. (Id.)

PAYMENT. See Accord and Satisfaction.

PHOTOGRAPH. See Criminal Law, 111, 112; Evidence, 7.

PLEADING.

1. **COMPLAINT IN INTERVENTION—DENIAL FOR WANT OF INFORMATION.**—In a suit to quiet title, where the matters involved are of such a character that the plaintiffs cannot hide behind the pretense of want of information, their answer to a complaint in intervention is not good if in this form: "These plaintiffs have no information upon the subject sufficient to enable them to answer all of the allegations contained in the complaint in intervention, and basing their denial upon that ground these plaintiffs deny," etc. (Davidow v. Griswold, 188.)
2. **DENIAL ON INFORMATION OR BELIEF.**—By such allegations the plaintiffs do not even bring themselves within the provision of the code permitting an answer upon the ground of want of "information or belief," (Id.)
3. **AMENDMENT OF COMPLAINT—STATUTE OF LIMITATIONS.**—A complaint in an action to recover for medical services, which declares on an express contract and alleges facts sufficient to sustain a *quantum meruit*, may be amended, over two years after it was filed, by amplifying the count on the express contract and adding another count on the *quantum meruit* for the reasonable value of the services. Such an amendment is not the substitution of a new cause of action so as to continue the running of the statute of limitations until its filing. (Merchants Collection Agency v. Gopcevic, 216.)

PLEADING (Continued).

4. AMENDMENT OF COMPLAINT—INTRODUCTION OF NEW CAUSE OF ACTION.—Where a complaint contains all the essential facts of a *quantum meruit*, the more formal and elaborate statement of them thereafter in a separate count in an amended complaint cannot be construed as the introduction of an entirely new cause of action. (Id.)
5. COMMON COUNTS—WHETHER PERMISSIBLE.—The common counts may be used to state a cause of action, notwithstanding the provision of section 426 of the Code of Civil Procedure that a complaint must state the facts constituting the cause of action in ordinary and concise language. (Id.)
6. COMPLAINT EMBRACING TWO COUNTS—ONE COUNT DEFECTIVE.—Where a complaint embraces two counts, one of which states sufficient facts to constitute a cause of action, it is good as against a general demurrer, and an appellate court will not reverse a judgment for the plaintiff, even if the other count is defective; for the sake of upholding it, the judgment will be presumed to be based upon the count against which there is no valid objection. (*Union Collection Co. v. Oliver*, 318.)
7. ASSIGNED CLAIM—ABSENCE OF ALLEGATION OF ASSIGNMENT.—A count in a complaint which does not allege any assignment or transfer to the plaintiff of the property or rights of action of the person whose claims to a right of action against the defendants are set forth in such count, is insufficient. (*Lapique v. Denis*, 683.)
8. ACTION INVOLVING ESTATE OF DECEDENT—UNCERTAINTY OF COMPLAINT—SUSTAINING OF DEMURRER WITHOUT LEAVE TO AMEND.—Where, in an action against several defendants for an accounting for moneys received from an estate of a decedent and for a recovery of moneys alleged to have been received by them as rentals from property fraudulently included in the administration of the estate of the deceased, it cannot be determined from the allegations of the fourth amended complaint in what capacity either of the defendants is sought to be held liable, or what relation either of them bore to the plaintiff's assignor, or to the estate, or to its executor or special administrator; or when any of the sums of money for which they are to account were collected or received by them; or what facts existed either in the intentions or within the knowledge of the defendants which justify the plaintiff in alleging that the defendants acted corruptly or for the purpose of divesting the plaintiff's grantor of any right possessed by him, the court properly sustains a demurrer to the complaint without leave to amend. (Id.)
9. DEMURRER—ADMISSION OF ALLEGATIONS OF COMPLAINT.—The general rule of pleading, which admits as true upon demurrer all matters of fact averred in a complaint, has no application to facts of

PLEADING (Continued).

which a court may take judicial notice; and a demurrer never admits the conclusion of law to be deduced from those facts. (*Fey v. Rossi Improvement Co.*, 766.)

See Accord and Satisfaction, 14-17; Damages, 3; Deed; Demurrer; Divorce, 1, 10; Escrow, 3; Estates of Deceased Persons; Evidence, 6; Forcible Entry and Detainer; Guaranty, 7, 8; Monopolies, 1, 4-7; Negligence, 9, 14, 23, 25; Parties; Sale, 3, 5.

PLEDGE.

PLEDGE OF CORPORATE STOCK—INTERPRETATION OF CONTRACT—ACTION BY PLEDGOR TO COMPEL REDELIVERY OF SHARES—PAYMENT AS CONDITION PRECEDENT.—Where the owner of corporate stock pledges it under an agreement to protect the pledgee against all loss, expense, and liability which he may incur in the matter of a pledge of stock to him made by another stockholder, the pledgee is not entitled, in an action against him by the first pledgor to recover the shares of stock, to payment from such pledgor, as a condition to redelivery of the stock, of moneys voluntarily paid out and expended by the pledgee in a wrongful and futile attempt to hold the stock of the second pledgor. The loss, expense, and liability against which the first pledgor agreed to protect the pledgee in entering into the contract with the second pledgor was such only as he might incur, under and by virtue of the terms of that contract, and not by reason of acts on the part of the pledgee and expenditures made wholly without the terms of the agreement. (*Newlin v. Myers*, 482.)

PRACTICE.

1. **DISMISSAL OF CASE—DELAY IN PROSECUTION—FAILURE TO SERVE SUMMONS WITHIN REASONABLE TIME.**—Section 581a of the Code of Civil Procedure makes it mandatory upon the court to dismiss an action where summons has not been served and return thereon made within three years after the commencement of the action, but the court may, in the exercise of a sound judicial discretion, dismiss an action before the expiration of the three years, if there has been, under the circumstances of the case, an unreasonable delay in its prosecution. (*Caldwell v. The Regents of the University of California*, 29.)
2. **ACTION TO QUIET TITLE—DISMISSAL FOR DELAY IN PROSECUTION.**—Where an action is brought to quiet title to land ten years after an alleged void foreclosure sale, and a *lis pendens* is filed at the time of the commencement of the action, it is not a sufficient excuse for a delay of nineteen months in serving summons that the plaintiff required that time to raise the amount of money, for which the sale

PRACTICE (Continued).

was made, to tender to the defendant, but which he claims he is not legally or equitably obliged to pay. The court does not, therefore, abuse its discretion in dismissing the action on the ground of unreasonable delay in its prosecution. (Id.)

3. DUTY OF PLAINTIFF TO BE IN READINESS TO PROSECUTE ACTION.—A party bringing an action should be prepared, when he files his complaint, if he is proceeding in good faith, to meet, as far as he is able to, every requirement which the nature and circumstances of the action and the averments of the complaint call for. (Id.)
4. ACTION ATTACKING TITLE TO REAL ESTATE—DUTY TO PROSECUTE DILIGENTLY.—Where the record title to real property is challenged by an action at law or a suit in equity, it is the duty of the plaintiff to act with all proper diligence in bringing the question to issue in the court, so far as it is within his power to do so; and when he does not do so for a long period of time, that is to say, where he fails, for what appears to be an unreasonable length of time, to legally notify the party upon whose title he has thus made an assault that he has done so, he should not be excused for his neglect, where he is called upon to account for it, except upon a showing of the most satisfactory and conclusive character. (Id.)
5. TRIAL—CONTINUANCE ON GROUND OF ABSENCE OF DEFENDANT—ABUSE OF DISCRETION IN REFUSING.—It is an abuse of discretion to refuse a continuance on the ground of the absence of the defendant, where it is shown by the statement of the plaintiff's counsel that no previous continuance has been requested and that the cause has been on the calendar for two years, and by the uncontradicted affidavit of counsel for the defendant that the defendant, who is the only witness to prove his defense, is ill, and, in search of health, has journeyed to Europe, from where he will return in two months; there being no intimation that the motion is not made in good faith, nor any showing that the plaintiff will be injured or prejudiced by the delay. (*Betts Spring Co. v. Jardine Machinery Co.*, 705.)

See Appeal; Attachment; Bill of Exceptions; Costs; Evidence; Execution; Findings; Instructions; Judgment; New Trial; Parties; Pleading.

PRESUMPTION. See Husband and Wife, 3-5.

PRINCIPAL AND AGENT. See Agency.

PROBATE LAW. See Estates of Deceased Persons.

PROHIBITION. See Criminal Law, 3; Evidence, 11; State Lands.

PROMISSORY NOTE.

1. PROMISE OF PAYEE TO ADVANCE MONEY TO BUILD HOUSE—BREACH OF AGREEMENT—FAILURE OF CONSIDERATION—ACTION TO CANCEL

PROMISSORY NOTE (Continued).

NOTE.—Where a promissory note, secured by a deed of trust and providing that on default in payment of interest the whole sum of principal and interest shall immediately become due at the option of the holder, is executed on the oral agreement of the payee to advance the money specified therein to the makers in certain installments as the erection of a house by them progresses, and the payee advances only a small part of the money called for by the note and transfers the note before maturity and for value to one without notice, the makers can maintain a suit to cancel the note and deed of trust. (*Smiley v. Watson*, 409.)

2. **NEGOTIABILITY OF NOTE—OPTION OF HOLDER TO DECLARE DUE ON DEFAULT IN PAYMENT OF INTEREST.**—Such note, secured by a deed of trust and due in three years with interest payable quarterly, is rendered non-negotiable by the clause "should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note." (*Id.*)
3. **CANCELLATION OF INSTRUMENTS—TENDER OF MONEY RECEIVED.**—In this action by the makers to have the note and deed of trust canceled, the payment by the plaintiffs into court, at the time of bringing suit, of the small amount of money received by them from the payee, to abide the result of the action, is a sufficient compliance with subdivision 2 of section 1691 of the Civil Code relating to restoration on rescission. (*Id.*)

See Evidence, 12; Negotiable Instruments.

PUBLIC OFFICERS. See Office and Officers.

PUBLICATION. See Municipal Corporations, 3, 4.

QUANTUM MERUIT. See Pleading, 3, 4.

QUIETING TITLE. See Evidence, 1, 2; Pleading, 1; Practice, 2.

RAILROAD. See Negligence, 4, 5, 14, 22-42; Street Assessment, 4-6.

RAPE. See Criminal Law, 122-135.

RECEIVER. See Surety.

REFORMATION. See Evidence, 6; Mistake.

REGENTS OF UNIVERSITY OF CALIFORNIA. See University of California.

RESIDENCE. See Divorce, 9-11; Election, 8, 10.

RESTRAINT OF TRADE. See Monopolies.

ROADS. See Streets, Roads, and Highways.

ROBBERY. See Criminal Law, 136-138.

SALE.

1. **SALE OF GRAPES—IMPLIED WARRANTY OF QUALITY.**—Where grapes are sold while on the vines, and the seller is informed that the buyer intends them for table use, a warranty is presumed that the grapes when delivered will be fit for such use. (*Pfah v. Porter*, 59.)
2. **EXECUTORY CONTRACT—GRAPES ON VINE—DAMAGE FROM RAINS.**—Where grapes are sold on the vines before they are ripe, to be picked and delivered at a railway station and then be paid for at a specified price per ton, the contract is executory, so that if the grapes are injured by rain before picking or delivery, the loss does not fall on the buyer. (*Id.*)
3. **ACTION FOR PRICE—AMENDMENT OF PLEADING.**—In an action by the seller to recover on such contract, the court properly refuses permission to amend the complaint "according to the evidence" and "set up a contract of absolute sale." (*Id.*)
4. **MOTION TO REOPEN CASE FOR FURTHER EVIDENCE—WHEN PROPERLY DENIED.**—A motion to reopen the case in order that the plaintiff may offer additional evidence is properly denied, where not supported by affidavit or other evidence justifying his omission to offer the evidence before the submission of the case, and where the evidence, if received, cannot produce a different result. (*Id.*)
5. **ACTION FOR GOODS SOLD—AMENDMENT OF ANSWER SO AS TO PLEAD STATUTE OF FRAUDS.**—In an action for goods sold and delivered it is not an abuse of discretion for the court to permit the defendant, at the close of the plaintiff's case, to amend his answer so as to affirmatively plead the statute of frauds, where that issue has already been presented by the denials of the answer. (*Gard v. Ramos*, 303.)
6. **WAIVER OF STATUTE OF FRAUDS BY FAILURE TO OBJECT TO ORAL EVIDENCE.**—In such action the defendant does not waive the issue as to the statute of frauds by his failure to object to oral evidence offered in proof of the agreement to purchase the goods, since such evidence, while not of itself sufficient to establish the agreement, is one of the steps in the order of proof required by the statute of frauds, and is admissible, when followed by the other evidence required by the code, in order to take the agreement out of the statute. (*Id.*)
7. **STATUTE OF FRAUDS—ORAL SALE OF GOODS—RECEIPT AND ACCEPTANCE.**—It is essential, in order to take an oral agreement for the sale of personal property of the value of over two hundred dollars

SALE (Continued).

out of the statute of frauds, that the buyer must accept the goods. The requirement of the Code in this respect is not affected by section 1624 of the Civil Code or section 197 of the Code of Procedure. (Id.)

8. **SALE OF JACK—CONSTRUCTION OF CONTRACT TO CONSUMMATION OF SALE—DEATH OF FIRST PARTY.** Contract providing that the "first party hereby agrees to sell to the second party, for a valuable consideration, a certain mare, subject to the following conditions, possession of jack to pass to the second party. First party guarantees jack to serve sixty (60%) of stock served the first year. In case of failure in either of foregoing provisions, first party to render to second parties their notes up to the amount of the contract to be liberally construed so as to protect the interests of the parties hereto," the plaintiff gets sixty per cent of the mares served the first year precedent upon the performance of which the sale depends; and where the jack dies through fault of the second parties, and fails to serve the stock of possession and death to get more than sixty per cent of the stock served with foal, the second party can set up these facts as a defense to an action on the contract. (Peatland Realty Company v. Edwards)

9. **MEANING OF WORD "SOLD"—EXECUTORY CONTRACT.** The word "sold" primarily means a contract of sale; such meaning is controlled by the context. It does not create an executory agreement not intended to be performed upon the performance of the condition.

See Brokers; Corporations, 16, 17; and Vendee.

SAN FRANCISCO, CITY AND COUNTY OF.
Waters.

SEAL. See Deposition, 2.

SEARCH WARRANT. See Criminal Law,

SPECIFIC PERFORMANCE

1. **STATUTE OF FRAUDS—CONTRACT TO CONVEY LAND.** Complaint, in an action for the specific performance of a contract to convey land, which does not show that the contract is in writing, fails to state a cause of action. (Copeland, 36.)

SPECIFIC PERFORMANCE (Continued).

2. **CONTRACT TO CONVEY LAND—SUFFICIENCY OF WRITING—DESCRIPTION OF PROPERTY.**—A writing relied upon to satisfy the statute of frauds in case of a contract to convey land must not only describe the property, but the description must be such as to facilitate, without the necessity of resorting to extrinsic or parol evidence, a ready identification of the property. (Id.)
3. **RECEIPT—SUFFICIENCY AS MEMORANDUM OF CONTRACT.**—The following receipt for money paid on account of the purchase price of land does not satisfy the statute of frauds and will not support an action for specific performance of the contract to convey: "Fresno, Cal., April 20, 1913. Received of S. B. Hines one hundred dollars, deposit on 40 acres of land at \$2200.00. Mrs. M. E. Copeland." (Id.)
4. **CERTAINTY OF DESCRIPTION OF PROPERTY IN CONTRACT TO CONVEY.**—Specific performance of an agreement to convey land will be decreed only where the land is so described in the contract that it may readily be identified from such description. The court must, in other words, be definitely made to know the precise property as to which the terms of the agreement are asked to be enforced. And such knowledge can be acquired only by these means or through that instrumentality prescribed by the law for the acquisition of such knowledge, that is, by and through such a writing as embraces all the essential features of the contract. (Id.)
5. **PART PERFORMANCE OF ORAL AGREEMENT—PART PAYMENT.**—Mere payments on the purchase price are not sufficient to take an oral contract for the sale of land out of the statute of frauds. It is only where the payment is accompanied by a change of possession, or the expenditure of money on the land, on the faith of the oral agreement, and where the failure to perform by the vendor will work a gross fraud upon the vendee, that a court of equity will decree specific performance by compelling the execution of the deed. (Id.)
6. **CONTRACT TO GROW AND SELL ORANGE TREES.**—Where one breaks his contract to grow and sell nursery orange trees of a kind which can be bought in the market at the place where the agreement is made, the buyer cannot maintain an action for specific performance against the seller and have him enjoined from disposing of the trees to others; the remedy is an action at law for damages. (*Emirzian v. Asato*, 251.)
7. **BREACH OF AGREEMENT TO SELL CHATTELS—REMEDIES.**—There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation; and where the breach of such a contract can be thus compensated, an injunction will not be granted to prevent the breach. (Id.)
8. **PERSONAL SERVICE—SPECIFIC PERFORMANCE OF CONTRACT RESPECTING.**—Performance of an obligation to render personal service cannot be specifically enforced. (Id.)

SPECIFIC PERFORMANCE (Continued)

9. **CONTRACT RELATING TO CHATTELS.**—In a contract relating to the transfer of property of market value and no special or unique character and sold in the open market. The remedy with the unpaid purchase money in an action, the buyer can purchase in the same character as that contracted for. (Id.)
10. **OFFER OF PERFORMANCE BY DEFENDANT FINDING.**—Where in an action for the contract to grow and sell nursery oranges of performance and refusal of acceptance upon such issue. (Id.)
11. **CONTRACT TO PURCHASE OIL LAND—DEFENSE.**—The vendor of oil land will performance of the contract of purchase may be sold on the market for the oil company v. Reward Oil Company, 638.
12. **VALUE OF LAND—MARKET VALUE AS** the value of the land in such action is See Wills, 7-11.

STATE LANDS.

STATE SCHOOL LANDS—LIMITATION OF TIME.—The superior court is divested determine a contest of a certificate of lands after the lapse of five years from prohibition will lie to restrain it from (Craycroft v. Superior Court, 182.)
See Tenants in Common, 3.

STATUTES. See Intoxicating Liquors, 6, 6-10.

STATUTE OF FRAUDS. See Sale, 5-7;

STATUTE OF LIMITATIONS. See Easements, Roads, and Highways, 2.

STOCK AND STOCKHOLDERS. See Corporations

STREET ASSESSMENT.

1. **MUNICIPAL CORPORATION—OMISSION OF DUTY OF STREETS.**—The fact that the street

STREET ASSESSMENT (Continued).

not sign an assessment for street improvements does not deprive the contractor of his right to a lien, if the assessment recites that the superintendent made it, and the warrant is signed by the superintendent and refers to the assessment and diagram as made by him, and the three documents are attached together and duly recorded. (*Petaluma Rock Company v. Smith*, 100.)

2. **MUNICIPAL CORPORATIONS—ASSESSMENT DISTRICT—INDEFINITE DESCRIPTION IN ORDINANCE OF INTENTION.**—Where the description of the boundary lines of an assessment district, as contained in the ordinance of intention, after a course has been traced to a point on the westerly line of Grand Avenue, proceeds "thence easterly in a direct line to the most westerly corner of lot 10 of Feldhauser's subdivision of blocks 85 and 86, Ord's survey, as per map," etc., and it appears from such map that there are two lots number 10 in the subdivision in question, both located in an easterly direction from the point on Grand Avenue referred to, the assessment is void because of the indefiniteness and uncertainty of the description, although both of such lots lie in an easterly direction from the point on Grand Avenue. (*Walker v. The City of Los Angeles*, 634.)
3. **"EASTERLY"—INTERPRETATION OF WORD—QUALIFYING PHRASES.**—The word "easterly" in such description is qualified by the phrase, "in a direct line to the most westerly corner of lot 10," and must be deemed not to indicate a true easterly course. The word "easterly," when used alone, will be construed to mean due east; but this is a rule of necessity, growing out of the indefiniteness of the term, and has no application where other words are used for the purpose of qualifying its meaning. Where such is the case, instead of meaning "due east," it means precisely what the qualifying word makes it mean. (*Id.*)
4. **MUNICIPAL CORPORATION—ASSESSMENT FOR PUBLIC IMPROVEMENT—LIABILITY OF RAILROAD RIGHT OF WAY.**—A city, if not specially authorized by the legislature in clear and unambiguous language, is without power to levy an assessment on the right-of-way of a railroad company extending through the municipality for a portion of the cost of a combined bulkhead and sidewalk within the limits thereof, or to make any sale of such property to satisfy an assessment so attempted. (*San Pedro, Los Angeles & Salt Lake Railroad Company v. Pillsbury*, 675.)
5. **SALE OF RAILROAD RIGHT OF WAY—INJUNCTION.**—If a sale of property being used for the purposes of which a railroad ordinarily uses its right-of-way is proposed in pursuance of such assessment, the railroad company is entitled to an injunction. (*Id.*)
6. **STREET ACT OF 1903—APPLICATION TO RAILROAD PROPERTY.**—The Street Act of 1903 (*Stats.* 1903, p. 376) which provides for the

STREET ASSESSMENT (Continued).

"laying out, opening, extending, widening or straightening" of public streets and ways within municipalities, and which expressly provides that in making an assessment for the public work therein provided for, the same shall be levied upon the lands within the assessment district, "including the property of any railroad," does not make the right of way of a railroad corporation liable for assessment and sale on account of work having reference to the improvement of streets already laid out and established. (Id.)

7. **MUNICIPAL CORPORATION—CONTRACT FOR STREET IMPROVEMENT—RELEASE OF CONTRACTOR BY EXECUTION OF SECOND CONTRACT—REMEDY OF PROPERTY OWNER.**—Where the board of public works, having entered into a valid contract for street improvement, makes another contract releasing the contractor from doing certain work required by the original contract, the remedy of a property owner is by appeal to the city council, which has power to set aside the assessment and order the work completed in accordance with the specifications; and if this remedy is not resorted to, an action to cancel the bond issued against his property for the improvement and to annul the lien thereof is not maintainable. (*McIntyre v. The City of Los Angeles*, 681.)

STREET RAILROAD. See Negligence, 22-42.

STREETS, ROADS, AND HIGHWAYS.

1. **STREETS AND PARKS—ESTOPPEL WHERE LOTS SOLD WITH REFERENCE TO MAP.**—Where the owner of land has it surveyed and platted as a townsite, files in the recorder's office a map delineating streets and parks, sells lots all over the tract described by reference to the map and upon representations that the streets have been laid out and dedicated to public use, and the lots are purchased and improved in reliance upon these representations, equity will not thereafter permit him to deny the dedication of the streets and parks as against the purchasers and the public. (*Davidow v. Griswold*, 188.)
2. **STATUTE OF LIMITATIONS—WHETHER BARS RIGHT TO USE STREETS.**—The statute of limitations can be of no avail as against the right of the public to use the streets thus dedicated; and even if the dedication is considered available only to the large number of persons who purchased lots, there is sufficient evidence in the record to support the finding against the bar of their right by the statute. (Id.)
3. **PUBLIC PARK—EXTENSION OF STREET ACROSS—RIGHT OF ABUTTING OWNERS TO INJUNCTION.**—Where land has been dedicated solely for purposes of a public park, the extension of a public street across

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STREETS, ROADS, AND HIGHWAYS (Continued).

it constitutes a diversion of the land from the uses to which it has been dedicated, and is in violation of the trusts upon which it is held, and may be enjoined at the instance of an abutting owner whose property will thereby be damaged. (*Mulvey v. Wangenheim*, 268.)

4. **GRANT FOR SPECIFIC PURPOSE—DIVERSION TO DIFFERENT USE.**—Where a grant is made for a specified, limited, and definite purpose, the subject of the grant cannot be used for another and a different purpose. (*Id.*)

See Easement, 2.

SUBROGATION. See Mortgage, 3.

SUMMONS. See Corporation, 8, 11, 12; Practice, 1.

SURETY.

PRINCIPAL AND SURETY—BOND OF RECEIVER—CONCLUSIVENESS OF JUDGMENT OF DISMISSAL.—Where the plaintiff in an action for an injunction procures the appointment of a receiver as ancillary thereto, and subsequently has the action dismissed, the judgment of dismissal is conclusive against the sureties on the bond of the receiver that his appointment was wrongful or without sufficient cause, and they become liable for damages resulting to the defendant from the receivership. (*Heim v. Mooney*, 233.)

See Appeal, 27-29; Landlord and Tenant, 9-12.

TAXATION. See Inheritance Tax.

TENANTS IN COMMON.

1. **ACQUISITION OF ADVERSE TITLE—TENANT AS TRUSTEE.**—As a general rule a tenant in common, occupying as he is presumed to, relations of trust and confidence toward his cotenants, may not acquire an adverse title to that under which possession of the property is held, without being charged as a trustee in the holding thereof for the joint benefit of the cotenancy; but the relation of cotenants is not necessarily so intimate as to preclude one of them from acquiring and asserting an adverse claim against the others. (*Robinson v. Bledsoe*, 687.)
2. **EXISTENCE OF TENANCY IN COMMON—COLOR OF TITLE AND ASSERTION OF CLAIM.**—In order that a tenancy in common may exist between parties in the holding of land, it is necessary that they possess some color of title and assert their claim in some tangible way. (*Id.*)
3. **STATE LAND—POSSESSORY RIGHT—CHARACTER OF POSSESSION.**—Under section 1006 of the Civil Code, a possessory right to state

TENANTS IN COMMON (Continued).

lands may be acquired which will be sufficient against all except the sovereignty. But this right must be evidenced by actual possession, for there can be no constructive possession in such a case. (Id.)

4. **ACTUAL POSSESSION—WHAT CONSTITUTES—NOTICE OF CLAIM.**—By actual possession is meant a subjection to the will and dominion of the claimant. It is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. The acts and things done must be of such a nature as to give notice to the public of the claim. (Id.)
5. **DESERT LAND USED BY CATTLEMEN—TITLE ACQUIRED BY ONE NOT HELD IN TRUST FOR OTHERS.**—Where, after a number of cattlemen have for years used a large tract of desert land for grazing, one of their number purchases a part of the land from the state, the others who have never asserted, or attempted in any way to give notice, that they claimed the right to the possession of any particular lands, except thirty acres thereof, cannot maintain an action to have it declared that the purchaser holds the land in trust for them as tenants in common. (Id.)
6. **EXCLUSION OF COTENANT—RIGHT TO CONSIDER TENANCY AT END.**—If the plaintiffs in such action fenced thirty acres of the tract, and excluded the defendant therefrom because of his refusal to pay his proportion of the cost of the fence, this entitled him to treat the assumed cotenancy, if any existed as to that ground, as at an end. (Id.)
7. **IMPROVEMENTS—FAILURE OF COTENANT TO MAKE CONTRIBUTION—SUMMARY REMEDY AGAINST HIM.**—There is no right in cotenants, who make improvements on the common property, to seize the property of a noncontributing member and so summarily work out their remedy for his failure to contribute to the cost of improvements made with his consent. (Id.)
8. **POSSESSION OF COMMON PROPERTY—EQUAL RIGHTS OF COTENANTS.**—To constitute a tenancy in common there must be an equal right to the possession of every part and parcel of the subject matter of the tenancy. (Id.)

See Husband and Wife, 3-5; Partition.

TENDER. See Vender and Vendee.

TRIAL. See Practice.

TRUSTS. See Banks; Corporation, 24; Deed, 1; Escrow, 8; Monopolies.

UNDUE INFLUENCE. See Wills, 1-6.

UNIVERSITY OF CALIFORNIA.

1. **STATE UNIVERSITY—STATUS AS CONSTITUTIONAL DEPARTMENT OF BODY POLITIC.**—In the constitution of 1879, by section 9 of article IX thereof, the University of California was raised to the dignity of a constitutional department or function of the state government. (Williams v. Wheeler, 619.)
2. **HEALTH REGULATIONS—POWER OF REGENTS TO REQUIRE STUDENTS TO BE VACCINATED.**—In the absence of any express legislative action looking to the adoption of a general law requiring vaccination as a condition of admission to a public educational institution, the board of regents of the state university have the right to make and enforce a reasonable rule upon that subject. (Id.)
3. **VACCINATION AS PREREQUISITE TO ENTERING UNIVERSITY—POWER OF REGENTS TO DEMAND.**—The board of regents of the University of California have power to adopt and enforce a rule requiring vaccination as a prerequisite to the admission of a student to the university, in the absence of legislation lawfully limiting the exercise of that power. (Id.)
4. **EXEMPTION CLAUSE IN VACCINATION STATUTE—WHETHER AVAILABLE TO STUDENTS OF UNIVERSITY.**—The provision of the act of 1911 (Stats. 1911, p. 295) which seeks to exempt those persons who are conscientiously opposed to the practice of vaccination from the operation of the law, otherwise general in its terms, requiring vaccination of persons seeking admission to educational institutions, is not in the nature of a health regulation; and, not being so, it is not such a proviso as comes within the general police powers with which the legislature is invested. Hence it cannot be availed of by those seeking enrollment in the University of California, to nullify the effect of the rule of the regents of the university that every person in attendance as a student, or applying for enrollment as such, shall produce evidence satisfactory to the authorities thereof that he has been successfully vaccinated within seven years prior to such attendance or application, or else be vaccinated. (Id.)

USE AND OCCUPATION. See Landlord and Tenant, 6.

VACCINATION. See University of California, 2-4.

VENDOR AND VENDEE.

1. **RECOVERY OF DEPOSIT—TENDER OF BALANCE OF PURCHASE PRICE AS CONDITION PRECEDENT.**—The rule that one who has contracted to purchase real property and has paid a deposit thereon, cannot recover his deposit without tendering payment of the balance of the

VENDOR AND VENDEE (Continued).

purchase money, is applicable only where neither the pleadings nor the evidence present an excuse for not making tender of the full purchase price. (Reed v. Witcher, 136.)

2. **ACTION TO RECOVER DEPOSIT—DELAY IN DEMAND—TENDER OF BALANCE.**—Where a contract for the purchase of real estate provides that if the title is found imperfect and cannot be perfected within ninety days the agreement shall be terminated and the deposit returned, and the vendor is unable to make title, not only within the ninety days, but, if at all, for a long time thereafter, the vendee does not lose his right to recover the deposit by not demanding a return of the money and declaring the contract at an end until a few days after the expiration of the ninety days, and he is not required to tender the balance of the purchase price. (Id.)

See Specific Performance.

VESSELS.

1. **LIEN AGAINST YACHT FOR CONSTRUCTION WORK—EXISTENCE INDEPENDENTLY OF ATTACHMENT.**—A lien upon a yacht for services and materials furnished in its construction, by virtue of the chapter of the Code of Civil Procedure beginning with section 813, is complete and sufficient without the attachment therein provided for. The lien is prior to and exists independently of any attachment. (Jensen v. Dorr, 701.)
2. **CODE PROVISION FOR LIEN—LIBERAL CONSTRUCTION.**—The code provision for such lien is not to be strictly but liberally construed, in view of the requirement of section 4 of the Code of Civil Procedure, that "its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice." (Id.)
3. **TIME LIMIT OF LIEN—COMMENCEMENT OF ACTION WITHIN YEAR.**—The commencement of an action to enforce such lien, in the form provided by sections 814 to 817 of the Code of Civil Procedure, within a year from the time the cause of action accrued, gives the court jurisdiction which cannot be lost merely because the necessary or unnecessary delays of litigation may postpone the entry of judgment until after the expiration of the year; section 813 of the Code of Civil Procedure providing that "such liens only continue in force for the period of one year from the time the cause of action accrued." (Id.)
4. **FORM OF ACTION—PROCEEDINGS QUASI IN REM.**—When such action is commenced in the form of a personal action against the owner, as well as for the enforcement of the lien, the proceeding is not *in rem*, but *quasi in rem*. (Id.)
5. **DISCHARGE OF DEFENDANT IN BANKRUPTCY—EFFECT ON LIEN.**—The fact that prior to the trial of the action the defendant is discharged

VESSELS (Continued).

in bankruptcy, so that it becomes impossible to obtain a personal judgment against him, does not prevent the enforcement of the existing lien against the yacht. (Id.)

WARRANTY. See Sale, 1.

WATER AND WATER-RIGHTS.

1. **WATERS AND WATERCOURSES—IRRIGATION DITCH—DUTY OF OWNER TO PREVENT INJURY TO OTHERS.**—The owner of an irrigation ditch must so construct and maintain it as that, in its operation, by the exercise of reasonable or ordinary care, no damage will result to others. To him applies the principle that one must so use his own property as not to injure that of others. (*Nahl v. Alta Irrigation District*, 333.)
2. **DEGREE OF CARE EXACTED FROM OWNER OF DITCH.**—Such owner, however, is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise only reasonable or ordinary care in the construction, maintenance, and operation of his ditches. (Id.)
3. **ACT OF GOD—LIABILITY OF OWNER OF DITCH OR CANAL.**—A ditch or canal owner is not responsible for that which is solely the result of an act of God, or inevitable accident; it is only when human agency is combined with the act of God, and neglect occurs in the employment of such agency, that a liability for damage results from such neglect. (Id.)
4. **OVERFLOW DUE TO EXTRAORDINARY FLOODS—LIABILITY OF OWNER OF DITCH.**—In this action against an irrigation company for damages occasioned by an overflow of one of its ditches, flooding the plaintiff's land and destroying eucalyptus trees thereon, the evidence is sufficient to justify the findings of the court that the overflow and consequent damages were not due to any fault or negligence of the defendant, but to extraordinary rainfall and unprecedented storms. (Id.)
5. **WATERS AND WATERCOURSES—AMOUNT OF APPROPRIATION—HOW DETERMINED.**—Priority in the use of waters and the capacity of the ditch through which they are diverted do not necessarily establish the extent of the right. The true test is the amount of water actually used for beneficial purposes. (*Trimble v. Hellar*, 436.)
6. **MEASURE OF APPROPRIATOR'S RIGHT—AMOUNT OF WATER ACTUALLY USED OR NEEDED.**—The appropriator's right is measured by what he in fact uses for some useful or beneficial purpose, not what he might have used; and if the capacity of the ditch is greater than is necessary to irrigate his lands, he will be restricted to the quan-

WATER AND WATER-RIGHTS (Continued).

tity of water needed for purposes of irrigation, water stock, and domestic purposes. (Id.)

7. **IRRIGATION—RIGHT TO ENLARGE USE OF WATER.**—Where the purpose for which water is appropriated is the irrigation of land, the appropriator is not confined to the amount first used, but is entitled to such further amount of water, within the capacity of his ditch, as will be required for future improvement of his land, if the right is otherwise kept up; but this right to enlarge the use may be lost by nonuser for a long period of time, and the appropriation of the water meantime by others. (Id.)
8. **AMOUNT OF APPROPRIATION—CIRCUMSTANCES INDICATING.**—In determining the amount of water to which a claimant is entitled, the acts and conduct of the first appropriator at the time of his appropriation, his object in making the appropriation, the quantity of land capable of irrigation, the necessity for irrigation, together with his actual appropriation and use, must be considered. (Id.)
9. **ACTION TO DETERMINE CONFLICTING WATER-RIGHTS.**—In this action to determine conflicting claims to the waters of Kerlin Creek, in Trinity County, it appears that the defendant never did, either by the acts of his predecessors in interest or by his own acts, acquire a right to a greater quantity of the waters of the creek than that allowed him in the judgment, that is, one-half thereof. (Id.)
10. **JUDGMENT—NECESSITY OF DEFINITELY FIXING QUANTITY OF WATER—EQUITABLE DIVISION.**—The failure of the court in such action to indicate definitely in its judgment the quantity of water to which each party is entitled is not objectionable where it appears that the flow of the stream is shown to vary greatly at different seasons of the year, that for a long period of the time the claimants have used substantially the same quantity and found it sufficient for their purposes, and that there have been no other users. (Id.)
11. **WATER-RIGHT—GRANT BY IMPLICATION.**—Where a water-right is appurtenant to land, it passes with a conveyance of the land, irrespective of whether the deed, in terms, conveys the "appurtenances." (Id.)
12. **APPROPRIATION—NOTICE AS DETERMINING QUANTITY OF WATER.**—Where an appropriator of water posts a notice of his claim to an amount of water in excess of what he appropriates, this will not affect the rights of other appropriators. His right is not measured by the extent of his appropriation as stated in the notice, or by the actual diversion from the stream, but by the extent to which he applies the waters for useful or beneficial purposes. (Id.)
13. **WATER-RIGHTS—SPRINGS AND STREAM—PAROL GRANT—ADVERSE USER.**—In this action to restrain the defendant from interfering with the plaintiff's use of water from a stream formed by springs

WATER AND WATER-RIGHTS (Continued).

situated on the defendant's land, the evidence shows a parol grant to the plaintiff to appropriate the water, followed by all the elements of adverse use under claim of right for more than the statutory period. (*Roseberry v. Clark*, 549.)

14. **PRESCRIPTIVE RIGHT TO WATER—INJUNCTION TO PROTECT.**—If the plaintiff in such case, with the knowledge and acquiescence of the defendant who owns the land on which the springs are situated and who had the prior right to the water, constructed a dam and appropriated the water of the stream notoriously and continuously, under claim of right, for more than ten years, he thereby acquired a prescriptive right to the continued use of the water, entitling him to an injunction against interference by the defendant. (*Id.*)
15. **EXTENT OF RIGHT TO USE WATER—COMPROMISE AGREEMENT—EVIDENCE TO SUSTAIN.**—The defendant not only failed to maintain his proposition that the plaintiff's use of the waters of all the springs was a mere permissive use and never developed into a use adverse to the interests of the defendant, but he also failed to maintain his proposition that, by the terms of an agreement upon which a compromise was had in a prior suit involving the same waters, the plaintiff was entitled only to the use of the waters of two springs, and nothing more. (*Id.*)
16. **WATERS AND WATERCOURSES—WATER SEEPING FROM DITCH OF APPROPRIATOR—SUBSEQUENT APPROPRIATION BY OTHERS.**—A prior appropriator of water may not so repair or reconstruct his ditch, flumes, and dam as to prevent water seeping through them from discharging into the original stream from which the water was taken, after such discharge has continued uninterruptedly for a length of time sufficient to establish a prescriptive title thereto in one who has actually appropriated and continuously used such seepage water, after its return to the original stream, during all of such period. (*Dannenbrink v. Burger*, 587.)
17. **AMOUNT OF WATER APPROPRIATED—HOW DETERMINABLE.**—It is neither the capacity of the ditch, nor the amount originally appropriated, which determines the rights of an appropriator of the waters of a stream, but the amount which he puts to some beneficial use. (*Id.*)
18. **WATER ESCAPING FROM ARTIFICIAL WATERCOURSE—RIGHTS OF APPROPRIATOR THEREOF.**—Where water escaping or leaking from an artificial watercourse goes to waste by flowing promiscuously over other lands, or finds its way to some other stream than the one from which it has been diverted, a person appropriating such water merely takes the *corpus* and not the usufruct therein, thereby leaving the owner of such ditch or artificial watercourse at liberty at any time to change or alter it without invading any vested right of the appropriator. But this rule does not apply where the

WATER AND WATER-RIGHTS (Continued).

escaped water has returned to the stream from which it was originally diverted, and has thereafter been appropriated by others than the original appropriator. (Id.)

See Navigable Waters.

WILLS.

1. **UNDUE INFLUENCE AS GROUND FOR REVOCATION OF PROBATE—SUFFICIENCY OF EVIDENCE.**—In this proceeding for the revocation of the probate of a will on the ground of undue influence, the evidence presented by the contestant falls far short of measuring up to the degree of proof required to establish undue influence, or requisite to have warranted the lower court in submitting the issue to a jury; and for these reasons the motion of the respondent for a nonsuit was properly granted. (Estate of Hodgdon, 415.)
2. **UNDUE INFLUENCE—EVIDENCE—WHETHER SUFFICIENT TO WARRANT COURT IN OVERTHROWING WILL.**—Courts have neither the right nor the power to overthrow a will on the ground of undue influence, in the absence of direct and substantial proof bringing the case within those well established rules of law which define undue influence, and prescribe the extent to which the evidence in any given case must go in order to measure up to the requirements of such definition. (Id.)
3. **WHAT CONSTITUTES UNDUE INFLUENCE IN EXECUTION OF WILL.**—Undue influence consists in the exercise of acts or conduct by which the mind of a testator is subjected to the will of the person operating upon it; some means taken or employed which have the effect of overcoming the free agency of the testator, and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment. (Id.)
4. **TIME AT WHICH UNDUE INFLUENCE EXERCISED.**—Courts must refuse to set aside a will upon the ground of undue influence, unless there is proof of a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made. (Id.)
5. **CONFIDENTIAL RELATION—HUSBAND AND WIFE—PRESUMPTION OF UNDUE INFLUENCE.**—Where a wife makes a will in favor of her husband, no legal suspicion of undue influence arises from their confidential relations so as to impose on him the burden of proving that he has not unduly influenced her in making the will; but such relation and the opportunity afforded thereby may be taken into consideration with other evidence to prove undue influence on his part. (Id.)
6. **REVOCATION OF PROBATE OF WILL—MOTION FOR NONSUIT—CONSIDERATION OF EVIDENCE.**—In considering the evidence before the court

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WILLS (Continued).

on a motion for nonsuit in proceedings for the revocation of the probate of a will, the entire evidence presented is to be viewed from a point most favorable to the contestant, disregard is to be had of contradictory evidence, all facts supporting the case of the contestant must be taken as true, and all presumptions from the evidence and all reasonable inferences susceptible of being drawn therefrom must be considered as facts proved in his favor. (Id.)

7. **SPECIFIC PERFORMANCE—CONTRACT TO MAKE WILL—CERTAINTY, FAIRNESS, AND CONSIDERATION.**—A contract to make a will, in order to be a proper subject for specific performance, must *prima facie* be fair, founded upon an adequate consideration, definite as to the conditions imposed and the obligations assumed, and, if the purported consideration is personal services, the agreement for them must be definite and certain not only with reference to their nature and character, but also with reference to the time of their continuance. (Parsons v. Cashman, 298.)
8. **PERFORMANCE OF PERSONAL SERVICES—UNCERTAINTY AS TO TIME.**—An agreement whereby a woman promises to make a will in favor of her nephew in consideration of his becoming an inmate of her home, assuming the obligations of a son, and assisting her in domestic and business affairs, is indefinite in an essential particular if silent as to the length of time for which such services are to be continued. (Id.)
9. **FAIRNESS OF AGREEMENT TO MAKE WILL.**—If it appears that such promise to make a will has not induced the promisee to relinquish anything of present or prospective value or advantage, but has operated to his profit rather than his detriment, and the agreement lacks fairness, specific performance will not be decreed. (Id.)
10. **CONSIDERATION FOR CONTRACT—OF WHAT TIME TO BE DETERMINED.** The sufficiency of a purported or claimed consideration for a contract to make a will must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments. (Id.)
11. **CONSIDERATION—BENEFIT TO PROMISOR OR DETRIMENT TO PROMISEE.** A consideration is sufficient to support a contract if there appears to be either a benefit to the promisor or a detriment to the promisee; both alternatives are not necessary. (Id.)

WITNESS. See Evidence.

WRIT OF REVIEW. See Certiorari.

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